

**REGULATING INTERNET PORNOGRAPHY AS AN ISSUE
OF SEX DISCRIMINATION**

MICHELLE EVANS
(BA, LLB)
(Student no. 19307235)

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DECLARATION

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution.

.....
Michelle Evans

ABSTRACT

This thesis will critically analyse Australia's censorship laws with a specific focus on the regulation of pornography distributed via the internet, a means of mass production and distribution of pornography.

It will be argued that Australia's current censorship laws are deficient because their focus is morality based. A morality based approach does not take into account what pornography is and does; in particular, the sex equality harms to real women¹ and the inequality within society caused by pornography.

This thesis will argue that the current censorship regime is an ineffective means of regulating internet pornography because it fails to address the complexities of internet regulation and the selling and marketing of sexual inequality online. This thesis will also

¹ This thesis will not discuss the harms of lesbian or gay male pornography as this is beyond the scope of this thesis. I accept, however, that no distinction should or can be drawn between the individual and systemic harms caused by same-sex pornography and heterosexual pornography. Both constitute an issue of sex discrimination. Academics like Christopher N. Kendall, for example, argue that, like heterosexual pornography, gay male pornography is harmful, not only to the real men used in gay male pornography, but also in promoting and maintaining homophobia and systemic inequality. Kendall, in his book, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 108 argues that gay male pornography is a source of homophobic oppression and inequality for gay men because it sexualises dominance and submission and the sex-based, patriarchal hierarchies that flow from a system in which "male" is top and "female" is bottom. Kendall writes that the gender hierarchies in gay male pornography mimic those in heterosexual pornography and consequently serve to reinforce inequality between men and all women and men and gay men. By maintaining these hierarchies, Kendall argues that gay male pornography buys into the very system it seeks to subvert – a homophobic power structure in which heterosexuality is compulsory and in which gay men, like all women, are inferior and unequal. On the harms of lesbian pornography, see for example, Jeffreys, Sheila, *The Lesbian Heresy* (Melbourne: Spinifex Press, 1993) and Reti, Irene (ed.), *Unleashing Feminism: Critiquing Lesbian Sadoomasochism in the Gay Nineties* (Santa Cruz: Her Books, 1993).

argue that these censorship laws have had little or no impact in reducing the availability of pornography distributed via the internet.

This thesis argues that a civil rights/equal opportunity approach to pornographic harm, as proposed by the anti-pornography civil rights ordinance drafted by American feminists Catharine MacKinnon and Andrea Dworkin² (“the ordinance”), should be adopted into Australian law. The ordinance will be examined with a particular focus on how it can be amended and incorporated into Australian equal opportunity legislation in order to more effectively regulate the distribution of pornography via the internet in a manner that addresses the harms to social inequality caused by pornography.³

² MacKinnon, Catharine and Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings*, (Boston: Harvard University Press, 1997), at 426-461 for the Minneapolis, Indianapolis and Massachusetts civil rights ordinances. Reference to the “ordinance” in this thesis is a reference to MacKinnon and Dworkin’s “Model Antipornography Civil Rights Ordinance” in Dworkin, Andrea and MacKinnon, Catharine A., *Pornography and Civil Rights: A New Day for Women’s Equality* (Minneapolis: Organizing Against Pornography, 1988), Appendix D

³ This thesis adopts the definition of pornography formulated by Catharine MacKinnon and Andrea Dworkin in clause 1, section 2 their civil rights ordinance. Specific types of pornography available via the internet are discussed in chapter 2 of this thesis.

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INTRODUCTION

PORNOGRAPHY AS SEX DISCRIMINATION

“The oppression of women occurs through sexual subordination...In the subordination of women, inequality itself is sexualised: made into the experience of sexual pleasure, essential to sexual desire. Pornography is the material means of sexualising inequality; and that is why pornography is a central practice in the subordination of women. Pornography uses each component of social subordination. Its particular medium is sex. Hierarchy, objectification, submission, and violence all become alive with sexual energy and sexual meaning. In pornography, each element of subordination is conveyed through the sexually explicit usage of women: pornography in fact is what women are and what women are for and how women are used in a society premised on the inferiority of women...Sex is the material means through which the subordination is accomplished. Pornography is the institution of male hierarchy that sexualises hierarchy, objectification, submission and violence. As such, pornography creates the necessity for and the actual behaviours that constitute sex inequality.”¹

Much has been written about pornography and there are numerous conflicting academic views and theories about what pornography is and does and how (if at all) it should be regulated. The traditional approach sees pornography as an issue of morality that should be regulated through censorship legislation on the basis of what a reasonable man would find offensive. Alternately, some argue that pornography should not be regulated because to do so would infringe freedom of speech and women’s freedom of sexual expression.² Another approach argues that pornography is an issue of sex discrimination which should be

¹ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography, and Equality” (1985) 8 *Harvard Women’s Law Journal*, 1 quoted in MacKinnon, Catharine, *Sex Equality* (New York: Foundation Press, 2001), 1571-1573

² See for example Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights* (New York: Scribner, 1995); Strossen, Nadine “Hate Speech and Pornography: Do we have to choose between Freedom of Speech and Equality?” (1995-1996) 46 *Case W. Res. L. Rev.* 449; Strossen, Nadine, “Preface: Fighting Big Sister for Liberty and Equality” (1993) 38 *N.Y.L. Sch. L. Rev.* 1. See generally Burstyn, Varda (ed), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985). See also Stychin, Carl F., *Law’s Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) whose focus is on the merits of gay male pornography.

regulated as a civil rights issue.³ This debate has not, with the exception of child pornography, extended far enough to the realm of the internet; in particular, to how the internet substantially increases the distribution and availability of pornography and how this has the potential to proliferate pornographic harms.

The traditional approach (regulating pornography as an issue of immorality⁴ - also known as obscenity) has been implemented and enforced in Australia through censorship legislation. The basis of this approach is that pornography should be censored because it has the potential to corrupt and deprave the viewers' morals, and potentially the morals of society as a whole. As MacKinnon explains, "obscenity law is concerned with morality, meaning good and evil, virtue and vice."⁵ Obscenity has an "I know it when I see it"

³ Those who oppose pornography from this perspective include Catharine A. MacKinnon, Andrea Dworkin, Diana E.H. Russell and Christopher N. Kendall. See MacKinnon, Catharine A., *Towards a Feminist Theory of the State* (Boston: Harvard University Press, 1989); MacKinnon, Catharine A., *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987); MacKinnon, Catharine A., "Pornography Left and Right" (1995) 30 *Harv. C.R.-C.L.L. Rev.* 143; MacKinnon, Catharine A., "Pornography, Civil Rights, and Speech" (1985) 20 *Harv. C.R.-C.L.L. Rev.* 1; MacKinnon, Catharine A., "Pornography as Defamation and Discrimination" (1991) 71 *B.U.L. Rev.* 793; Dworkin, Andrea, "Pornography: The New Terrorism" (1978-1979) 8 *N.Y.U. Rev. L. & Soc. Change* 215; Russell, Diana E.H., *Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993); Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993).

⁴ In this thesis I have used the terms "morality", "obscenity" and "censorship" interchangeably. "Obscenity" has its origins in the criminal law and concerns the suppression of materials which are deemed to be indecent or obscene in accordance with prevailing community standards. "Censorship" is a subset of obscenity which usually does not involve the criminal law. Its foundations are in obscenity. Censorship involves a Censorship Board categorising materials in accordance with their level of offensiveness in accordance with prevailing community standards. Both censorship and obscenity involve a judgment being made about what is acceptable for reading or viewing in accordance with community standards. Both involve the suppression of materials deemed to be harmful to both the individual and society's moral fibre.

⁵ MacKinnon, Catharine A., *Towards a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 196

standard⁶ and is a male construct; “Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance.”⁷ Obscenity regards women’s bodies as being “dirty” and “filth”.⁸ As Dworkin argues, “...because women are seen primarily as sex, existing to provide sex, women have to be covered: our naked bodies being obscene”.⁹ This is the approach adopted in Australia through legislation such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) in which publications are measured against “standards of morality, decency and propriety generally accepted by reasonable adults”.¹⁰ These standards also apply to the regulation of internet content under the *Broadcasting Services Act 1992* (Cth).¹¹

An alternate view, adopted primarily by defenders of pornography, such as American Civil Liberties Union President, Nadine Strossen, sees pornography as an issue of free speech. This view holds that censorship restricts the freedom to speak and that regulating pornography, even from an equality perspective, is a form of censorship which interferes with freedom of speech.¹² Strossen goes further by denying that pornography causes any

⁶ *Jacobellis v Ohio* 378 U.S. 184, 197 (1964) per Stewart J quoted in MacKinnon, Catharine A., *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987), 147

⁷ MacKinnon, Catharine A., *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987), 147

⁸ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography, and Equality” (1985) 8 *Harv. Women’s L. J.* 1, 7

⁹ *Ibid*

¹⁰ See for example section 11(a) of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (“*Classification Act*”)

¹¹ *Broadcasting Services Act 1992* (Cth) (“*Broadcasting Services Act*”)

¹² See for example, Strossen, Nadine, “Hate Speech and Pornography: Do we have to choose between Freedom of Speech and Equality” (1995-1996) 46 *Case W. Res. L. Rev.* 449

tangible or provable harm.¹³ She also argues that any attempt to regulate pornography is detrimental to women's sexual expression and amounts to censorship which has traditionally been used to silence women.¹⁴

This thesis will argue that the preferable view about what pornography is and does is that articulated by US feminists Catharine MacKinnon and Andrea Dworkin. As the quotation at the commencement of this chapter indicates, MacKinnon and Dworkin argue that pornography sexualises and maintains inequality by promoting women as inferior and subordinate to men. It does this by associating women with feminine, men with masculine and by showing the masculine (male) as dominant and women (feminine) as inferior objects to be used, controlled, and violated for male sexual pleasure. Pornography does this in a context which shows these gender hierarchies as the "natural" or "normal" order of things. For MacKinnon and Dworkin, pornography is a sexually discriminatory act and

¹³ See for example, Strossen, Nadine, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York; Scribner, 1995) at 183-184 where Strossen gives the example that Linda Marchiano's abuse was not due to the pornography industry but due to her abusive husband in order to illustrate that pornography does not cause any provable harm. Ms Marchiano's abuse is detailed in chapter 1 of this thesis.

¹⁴ See Strossen, Nadine, "Preface: Fighting Big Sister for Liberty and Equality" (1993) 38 *N.Y.L. Sch. L. Rev.* 1 where she states at 8:

"...we are convinced that censoring sexual expression would actually do more harm than good in terms of women's rights and safety. Therefore, we adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms – our freedoms to read, think, speak, write, paint, dance, dream, photograph, film and fantasize as we wish – but also because it would undermine our equality, our status, our dignity, and our equality. Women should not have to choose between freedom and safety, between speech and equality, between dignity and sexuality...We insist on the right to enjoy the thrills of sex and sexual expression without giving up our personal security. We can exercise our speech and our equality rights to denounce any sexist expression of any sort – including sexist expressions that are also sexual – rather than seeking to suppress anyone else's rights."

See also Burstyn, Varda (ed), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985); Hunter, Nan and Law, Sylvia, "Brief Amici Curiae of Feminist Anti-Censorship Task Force" (1988) 21 *Michigan Journal of Law Reform*. This brief was written in opposition to the Indianapolis ordinance.

should be legally actionable as such. MacKinnon and Dworkin's work on pornography will be discussed in more detail in chapter 1.

The growth of the internet from an academic medium to an international information superhighway has been rapid and the proliferation of pornography on the internet has been exponential.¹⁵ Pornography is not only easy to find on the internet (even when one is not looking for it¹⁶) but is frequently available free of charge¹⁷, and can be viewed in the privacy of the home.

The prevalence and ease of access to pornography via the internet, including sexually violent pornography, pornography categorised as non-consenting, degrading or dehumanising¹⁸ and the growth of the internet into homes and businesses requires a careful and serious reconsideration of the way the law regulates pornography available via the internet, and in particular, ways to prevent and redress the harms that result from its distribution and use.

¹⁵ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 11-12

¹⁶ See Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 6-11 for a discussion of "paths to exposure". Flood and Hamilton (at 6-11) outline paths to exposure to internet pornography through the use of techniques such as "pop-ups" and "Traffic forwarding" (also called "mousetrapping"). "Pop-ups" are unsolicited pornographic pictures which are often difficult for the viewer to close and often appear one after the other (at 9). "Traffic forwarding" is where the viewer is automatically forwarded to another web site and often prohibited from leaving it (at 9). These and other paths to exposure will be discussed in chapter 2.

¹⁷ Id, 8

¹⁸ Id, 30-35

In Australia, adult pornography, available via books, magazines and videos, has traditionally been regulated by the Federal Office of Film and Literature under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) which provides that “standards of morality, decency and propriety generally accepted by reasonable adults” should be taken into account in the classification of a publication, film or computer game by the Classification Review Board.¹⁹ Furthermore, there is a *National Classification Code* in the Schedule to the Act that names and describes the classification categories that the Board applies.²⁰ This Code also contains references to morality, including standards of “morality, decency and propriety”.²¹ There is a *National Classification Scheme* under which states and territories are responsible for the enforcement of decisions of the Federal Classification Review Board.²² In Western Australia, the relevant enforcement legislation is the *Censorship Act 1996* (WA).

In summary, these laws are based on censoring what a reasonable man would find offensive. This morality based approach has also been carried through to the regulation of pornography distributed via the internet by the *Broadcasting Services Amendment (Online*

¹⁹ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (“*Classification Act*”) s11(a)

²⁰ Section 9 of the *Classification Act* provides that, “Publications, films and computer games are to be classified in accordance with the Code and the Classification Guidelines”. The definitions section of the *Classification Act*, section 5 defines “Code” as “the National Classification Code set out in the Schedule, or that Code amended in accordance with section 6.” The Schedule begins by stating several principles that Classification decisions must give effect to including “(c) everyone should be protected from exposure to unsolicited material that they find offensive”. The Code then sets out three tables by which publications, films and Computer Games are to be classified. These Tables contain reference to “the standards of morality, decency and propriety generally accepted by reasonable adults.”

²¹ *Ibid*

²² See *Censorship Act 1996* (WA), (“*Censorship Act*”) Part 9 “Enforcement”

*Services) Act 1999 (Cth)*²³ which, in 1999, amended the *Broadcasting Services Act 1992 (Cth)*²⁴ to include a new Schedule 5, dealing with “online services.”²⁵ Despite having the opportunity of changing the focus of regulating internet pornography in a manner that addresses the harms of pornography, the *Broadcasting Services Act* remains morality focused, relying on the categories for the classification of films to regulate internet content.²⁶

This thesis will argue that the censorship/morality based approach adopted in Australia is ineffective and inappropriate for regulating pornography distributed via the internet because it does not address the harms of pornography: specifically, sexual inequality. In addition, the international and technological nature of the internet makes censorship redundant because internet content can be easily removed from one part of the internet and replaced in another, or can be removed temporarily and reinstated later on. In addition, the internet is so vast that censored pornographic web pages can be quickly and easily replaced with new pornographic web pages.

²³ *Broadcasting Services Amendment (Online Services) Act 1999 (Cth)* (“*Broadcasting Services Amendment Act*”)

²⁴ *Broadcasting Services Act 1992 (Cth)* (“*Broadcasting Services Act*”)

²⁵ *Id.*, Schedule 5 “Online Services”

²⁶ For a discussion of how this legislation failed to take the opportunity to adopt a sex equality approach which addresses the harms of pornography, and instead adopted a censorship/morality based approach see Kendall, C, “Australia’s New Internet Censorship Regime: Is This Progress?” (1999) 3 *Digital Technology Law Journal* at <http://www.law.murdoch.edu.au/dtlj/>. Please note that this entire electronic journal has been deleted from this web site and is consequently no longer accessible. I have obtained the author’s permission to cite this journal article.

This thesis will argue that instead of a censorship/ morality-based approach, the civil rights approach to pornography proposed by MacKinnon and Dworkin, which recognises pornography as an issue of sex discrimination, should be adopted into Australian sex discrimination legislation.

Chapter 1 will discuss what pornography is and what pornography does. It will examine three kinds of pornographic harms that have been identified by anti-pornography feminists. These include firstly, the emotional and physical harms to those persons used in pornography. Secondly, pornographic harms include the physical, sexual and emotional abuse inflicted by many of those who consume pornography on their spouses, partners, children, siblings and strangers. Thirdly, at a broader level, pornography supports systemic gender inequality through sexualising rape, pain, mutilation and degradation by one person (masculine/male/dominant) on another person (feminine/ female/ submissive).

Chapter 2 will discuss pornography distributed via the internet. The Chapter will begin with a discussion of what the internet is and how it developed, followed by a discussion of the types of pornography that can be accessed via the internet. Recent discussion papers by the Australia Institute on internet pornography will also be outlined.²⁷ These discussion papers detail the variety of pornography that can be accessed via the internet. This material will be critiqued applying a radical feminist sex equality perspective of pornographic harm.

²⁷ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003). See also Flood, Michael and Hamilton, Clive, *Regulating Youth Access to Pornography*, Discussion Paper Number 53 (Canberra: The Australia Institute, 2003)

Chapter 3 will discuss what Australia is doing about pornography, including internet pornography. In particular, Australia's censorship legislation will be outlined including the *Broadcasting Services Act* as amended by the *Broadcasting Services Amendment Act*. It will be shown that this legislation focuses on regulating pornography as an issue of morality. In particular, the legislation adopts the perspective that pornography must be censored because it has the potential to harm society's moral fibre.

Chapter 4 will discuss why a morality based censorship approach to pornography is unworkable and inappropriate. In particular, such an approach fails to address the harms to real women caused by pornography, as outlined in Chapter 1. This chapter will firstly outline the concept of obscenity law, which focuses on maintaining morality rather than making pornographic harm actionable. The Canadian Supreme court decision of *R v Butler*²⁸ will then be examined. *Butler* went some way toward recognising these real harms to real women by recognising that pornography contributes to maintaining systemic gender inequality in society. However, the Supreme Court was interpreting the definition of "obscenity" in the Canadian Criminal Code which has its basis in morality. As such, the Supreme Court was constrained by having to impose criminal law penalties and could not offer a remedy that specifically addressed pornographic harm. This chapter will argue that the civil rights ordinance drafted by MacKinnon and Dworkin is the only method of regulation that recognises the harms of pornography whilst taking the power of regulation out of the control of police and government officials and into the hands of women. It will be argued that the civil rights approach proposed by the ordinance is the most appropriate

²⁸ *R v Butler* (1992) 1 SCR 452

and effective way to regulate internet pornography because a civil rights approach is the only approach which recognises and provides remedies for pornographic harm. This chapter will illustrate that a morality based approach is ineffective, compared to the ordinance, through the use of a case study from the Western Australian case of *Horne & Anor v Press Clough Joint Venture & Anor*.²⁹ In this case, two women, working in a male dominated work place were subjected to prolific and violent pornography in their workplace, which was held by the Equal Opportunity Tribunal of Western Australia to constitute sex discrimination and victimisation in the workplace.

Chapter 4 will also briefly examine how the ordinance should be amended in order to adequately address internet pornography. It will then examine how the ordinance can be adopted into Australian sex discrimination law.³⁰ A necessary part of the discussion of how the Ordinance can be amended to address internet pornography is jurisdiction. Due to the global nature of the internet, pornography may be made in country one, distributed through an internet server in country two, with the harm resulting in country three. This creates uncertainty as to the jurisdiction of the Australian Courts to award a person harmed by pornography damages or injunctive relief. It also creates uncertainty over who to sue and where to sue. Recent internet defamation cases will be examined, which provide some guidance in relation to determining jurisdiction.³¹

²⁹ *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556

³⁰ For example, *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 1984* (WA)

³¹ For example *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 which discusses where harm results with respect to defamation over the internet.

The central theme of this thesis is that Australian law must recognise what pornography really is and does. In the words of MacKinnon:

“Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women’s opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life...”³²

Censorship laws have long failed to address what pornography is and does to women and society as a whole. The need for law reform is now urgent due to the growth of the internet and the proliferation of pornography on the internet. The internet allows pornography to be distributed more widely than ever before and brings pornography into our homes like never before. The availability of internet technology, such as digital cameras, e-mail and the ability for any person to create a web page, allows everyday people to become pornographers and for pornography to be made of women in their own homes. The resulting harms demand immediate action and legislative reform. In that regard, Australia must adopt a sex equality approach to effectively address the harms of pornography – harms that are now more pervasive than ever before.

³² MacKinnon, Catharine A., *Sex Equality* (New York: Foundation Press, 2001), 1562

CHAPTER 1

WHAT PORNOGRAPHY DOES: A SEX EQUALITY PERSPECTIVE ON THE HARMS OF PORNOGRAPHY

I. AN INTRODUCTION TO WHAT PORNOGRAPHY IS AND DOES: THE IMPORTANCE OF ADOPTING A SEX EQUALITY APPROACH TO REGULATION

“Pornography does not exist in isolation. This is not an issue of special interest for a small minority group. The sadistic violence and sexual enslavement we speak of is not isolated or remote – it is real. It is in the stories of the battered wives, molested children and raped women that happen everyday...It is evident that pornography could not be the product of a non-sexist culture where women are acknowledged as fully valuable human persons. In a non-sexist culture it would be shocking and intolerable to the community to view these images of women. In ours it is common place. We know we are free when pornography no longer exists. As long as it does exist we must understand that ‘we are the women in it,’ used by the same people, subject to the same devaluation.”¹

As this quotation illustrates, pornography is not a harmless picture on a page, or a mere image on a film, video or computer screen. What is presented is the reality of every day life; a reality constructed through the lens of sex discrimination. Pornography has a very real impact on the lives of women and children and on the social construction of sexual inequality. We live in a society in which photographs and films of women and children being raped, abused and tortured in a sexual context are in demand and are readily available, particularly via the internet. Society readily accepts new technologies, such as the internet, but is slow to recognise or give consideration to the implications of these new technologies. Society has also shown a reluctance to re-think the existing legislative censorship approach to more effectively regulate internet pornography as an issue of sex

¹ Testimony of Cheryl Champion, Minneapolis Press Conference, quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 262

equality. As will be explained shortly, it is a sex equality approach that appreciates what pornography is and does by empowering those harmed by pornography to seek financial redress and injunctive relief against its makers and distributors.²

This chapter will address “what pornography really is”³ and what pornography *does* in order to establish why Australia’s internet anti-pornography laws are ineffective and inappropriate for regulating internet pornography.

Australia’s current laws for regulating access to pornography are drafted from the perspective of a patriarchal⁴ misunderstanding of the impact of pornography on women and children’s lives. In particular, current censorship legislation is morality⁵ based. This

² Section 5(2)(a) of MacKinnon and Dworkin’s ordinance states that any person who has a cause of action under the Ordinance may seek “nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorney’s fees and costs of investigation”. Section 5(3)(a) provides that injunctive relief may also be sought. This could be utilised to stop pornography being shown, sold and distributed.

³ Testimony of Jaye Morra at the Massachusetts Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 414. Jaye Morra used the phrase, “what pornography really is” in her Testimony at the Hearing.

⁴ “Patriarchy” is defined in Tuttle, Lisa, *Encyclopaedia of Feminism* (London: Arrow Books, 1986), 242 as:

“The universal political structure which privileges men at the expense of women...It is sometimes used as a synonym for male domination...Literally it means ‘rule of the father’, and was originally used by anthropologists to describe the social structure in which one old man (the patriarch) has absolute power over everyone else in the family. Feminists then began to point out that all societies, whatever their economic, political or religious differences, are patriarchies. All known societies are ruled by men, who control and profit from women’s reproductive capabilities. Under some systems, women have more privileges, even token power, than in others, but everywhere men are dominant, and the basic principles, defined by Kate Millett in *Sexual Politics* (1970), remain the same: ‘male shall dominate female; elder male shall dominate younger....’

⁵ I have used the term, “morality” to describe a censorship approach to pornography. Such an approach is also referred to as “obscenity” and censorship legislation as “obscenity legislation”.

chapter aims to explore why any approach which regulates on the basis of “immorality” will fail to address one of the central harms of pornography: sexual inequality.

A sex equality approach to regulating pornography was first formulated by feminist attorney and law professor Catharine MacKinnon and feminist writer Andrea Dworkin. In 1983, MacKinnon and Dworkin were approached by residents of two working class areas of Minneapolis to help them draft a zoning ordinance which would only permit pornography to be sold in specified low income neighbourhoods.⁶ MacKinnon and Dworkin convinced the relevant Zoning and Planning Committee that this would only legitimise pornography and convinced the Committee that the ordinance should adopt a sex equality approach.⁷

As mentioned above, under the ordinance drafted by MacKinnon and Dworkin, those harmed in or by the production and distribution of pornography could sue the makers and distributors of that pornography. The ordinance was the first attempt to regulate pornography as an issue of sex discrimination.⁸ The Minneapolis ordinance was enacted but vetoed by the then Mayor.⁹ In 1984, Indianapolis passed a similar ordinance as

⁶ See generally MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997). See also Kendall, Christopher, N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 183 – 184 for a summary of the history of the Ordinance.

⁷ Ibid

⁸ Ibid

⁹ Ibid

legislation.¹⁰ It was later held to be unconstitutional because it was deemed to be a violation of the right to freedom of speech, protected by the First Amendment to the American Constitution.¹¹

The inter-relationship between pornography and freedom of speech was also an issue in *R v Butler*¹², in which the Supreme Court of Canada considered whether Parliament's regulation of pornography via the *Canadian Criminal Code* infringed freedom of speech and expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter"). The court recognised that pornography contributes to and maintains women's subordinate position within society and for this reason held that regulation of pornography through the Criminal law was justified by section 1 of the Charter. Section 1 provides that the rights and freedoms in the Charter are "subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The court held that regulating such harm was such a reasonable limit.

On the other hand, Australia does not have an express constitutional protection of freedom of speech.¹³ This is because Australia's Commonwealth Constitution does not include a

¹⁰ Ibid

¹¹ *American Booksellers Association v Hudnut* 771 F 2d 323 (7th Cir. 1985) ("Hudnut") cited in MacKinnon, Catharine A & Dworkin, Andrea *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997) which outlines the history of the Ordinance. See also MacKinnon, Catharine A, *Only Words* (Cambridge: Harvard University Press, 1993), 65-68 for a discussion of *Hudnut*.

¹² *R v Butler* (1992) 1 SCR 452

¹³ However, in *Australian Capital TV Pty Ltd v Commonwealth* (1992) 177 CLR 106 the High Court of Australia recognised an implied right in the Commonwealth Constitution to freedom of political speech in the context of election advertising. For a discussion of this case see Scutt, Jocelyne A, *The Incredible Woman: Power & Sexual Politics Volume 2* (Melbourne: Artemis Publishing, 1997), 248-249

bill of individual rights. Although the High Court of Australia has recognised that there is an implied right of freedom of communication¹⁴, it is not an individual right or “personal freedom”.¹⁵ Rather, the implied right to freedom of communication will render legislation constitutionally invalid if it interferes with “freedom to communicate with respect to public affairs and political discussion”.¹⁶ Consequently, the ordinance could be enacted in Australia without risk of a constitutional challenge on the basis that such an attempt to regulate pornography would infringe constitutionally protected free speech.¹⁷

Consequently, there is no constitutional reason as to why MacKinnon and Dworkin’s sex equality approach to regulating pornography should not be adopted in Australian law to replace the current morality based approach in respect to pornography distributed via the internet or otherwise.

The sex equality approach of the ordinance is demonstrated by its definition of pornography in section 1(1) as follows:

“(1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:

¹⁴ See *Nationwide News Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211

¹⁵ Brennan J in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 149 stated that “The freedom which flows from the implied limitation on power considered in *Nationwide News* and *ACTV* is not a personal freedom...the implication limits legislative and executive power”. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

¹⁶ Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 142

¹⁷ For a general discussion of the application of the ordinance in an Australian constitutional context, see Gaze, Beth, “Pornography and Freedom of Speech: An American Feminist Approach” (June 1986) *Legal Service Bulletin* 11(3), 123

- (i) women are presented as dehumanised as sexual objects, things or commodities; or
 - (ii) women are presented as sexual objects who enjoy pain or humiliation; or
 - (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
 - (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
 - (v) women are presented in postures of sexual submission; or
 - (vi) women's body parts – included but not limited to vaginas, breasts or buttocks – are exhibited, such that women are reduced to those parts; or
 - (vii) women are presented as whores by nature; or
 - (viii) women are presented as being penetrated by objects or animals; or
 - (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
- (2) The use of men, children or transsexuals in the place of women in (1)(i-ix) above is pornography...”

Australia has not adopted this approach. It should. Rather, in Australia, Commonwealth legislation regulates internet pornography as a matter of morality through censorship legislation, namely the *Broadcasting Services Act*¹⁸ Internet pornography is regulated as “prohibited content” pursuant to section 2 of Schedule 5 of the Act:

“Internet content hosted in Australia is **prohibited content** if:

- (a) the content has been classified RC (Refused Classification) or X by the Classification Board; or
- (b) the content has been classified R by the Classification Board and access to the content is not subject to a restricted access system.”

Under the *Broadcasting Services Act*, the “Classification Board” is defined in section 5, the definitions section of Schedule 5 as “the Classification Board established by the

¹⁸ *Broadcasting Services Act 1992* (Cth) (“*Broadcasting Services Act*”)

Classification (Publications, Films and Computer Games) Act 1995.” This means that classification of internet pornography is classified by the Act using the same classifications as films proscribed by the *Classification (Publications, Films and Computer Games) Act 1995* (“the Classification Act”). These classifications are determined by the Classification Review Board which, amongst other things, considers “the standards of morality, decency and propriety generally accepted by reasonable adults”¹⁹ that should be taken into account in the classification of internet content.

The National Classification Code to the *Classification Act* provides more detail about the classifications of Films as “RC”, “X 18+”, and “R 18+”.²⁰ The relevant part of the Schedule relating to these classifications is reproduced below. Italics have been used to highlight the focus of the Act on standards of morality to determine classifications:

Description of film	Classification
1. Films that: (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or <i>revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults</i> to the extent that they should not be classified; or (b) describe or depict in a way that is <i>likely to cause offence to a reasonable adult</i> , a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence.	RC
2. Films (except RC films) that: (a) Contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence,	X 18+

¹⁹ *Classification Act*, s11(a)

²⁰ See Office of Film and Literature Web page for the “National Classification Code” located at <http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf> accessed 19 July 2005

sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, <i>in a way that is likely to cause offence to a reasonable adult</i> ; and (b) are <i>unsuitable</i> for a minor to see.	
3. Films (except RC films and X 18+ films) that are <i>unsuitable</i> for a minor to see.	R 18+
4. Films (except RC films, X 18+ films and R 18+ films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be <i>unsuitable for viewing</i> by persons under 15.	MA 15+
5. Films (except RC films, X 18+ films, R 18+ films, MA 15+ films) that <i>cannot be recommended for viewing</i> by persons who are under 15.	M
6. Films (except RC films, R 18+ films, X 18+ films, MA 15+ films and M films) that <i>cannot be recommended for viewing</i> by persons who are under 15 without the guidance of their parents or guardians.	PG
7. All other films.	G

This morality based model cannot do what the ordinance can because it does not recognise or provide remedies for the harms of pornography. Evelina Giobbe, a survivor of pornography and prostitution stated:

“I am a rare survivor. Most women who have shared my experiences are not as fortunate. It took close to 20 years to undue [sic] the physical and emotional trauma of being used in prostitution and pornography. Today I am an activist in the feminist anti-pornography movement. But the pornography that was made of me still exists. I know the men who made it. I know where some of them are. But there is nothing I can do about it. I live knowing that at any time it could surface and be used to humiliate me and my family. It can be used to ruin my professional life in the future. Because pornography is a profitable multi-billion-dollar-a-year industry, I also know that what happened to me will continue to happen to other women and girls. They will continue to be used and hurt in the same way that I was. And if they should be fortunate enough to escape, they will live under the same threat of exposure and blackmail that I do.”²¹

²¹ Giobbe, Evelina, “Surviving Commercial Sexual Exploitation” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 40

A censorship/ morality-based model cannot help women like Ms Giobbe. It cannot recognise the harms done to these women, or provide them with compensation or damages. Morality cannot seize the pornography made of these women; nor can morality provide injunctive relief to stop pornography being sold, shown and distributed. The ordinance can. Specifically, the ordinance, in the words of Mackinnon, operates as follows:

“This law defines the documented harms pornography does as violations of equality rights and makes them actionable as practices of discrimination. This ordinance allows anyone hurt through pornography to prove its role in their abuse, to recover for the deprivation of their civil rights, and to stop it from continuing.”²²

II. AN EXAMINATION OF PORNOGRAPHIC HARMS

In order to demonstrate the importance of regulating internet pornography from MacKinnon and Dworkin’s harms based equality perspective, instead of a censorship/ morality perspective, this chapter will outline what pornography is and does by examining three kinds of pornographic harms that have been identified by anti-pornography feminists which are not addressed by a morality/ censorship approach to regulation. These harms include:

- (i) Harms to persons used in pornography. These persons are sometimes known as “actors.”²³

²² MacKinnon, Catharine A, *Only Words* (Cambridge: Harvard University Press, 1993), 65

²³ By using the term, “actors” I am referring to the people who are *used* in pornography. I do not intend the use of the term “actors” to suggest that what we see in pornography is not real and that the participants are only “acting”. In reality, pornography is made of real people whose consent is often absent or coerced. See Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980). See also Steinem, Gloria, “The Real Linda Lovelace” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 23. I agree with Kendall whose analysis of the term “actors” used in gay male pornography, is equally applicable to heterosexual pornography:

- (ii) Harms to “non-actors”. By this I mean the physical, sexual and emotional abuse inflicted by some men who consume pornography on their spouses, partners, children, siblings and strangers;
- (iii) Maintaining systemic gender inequality and sex discrimination.²⁴ Sexual inequality is reflected in pornography through sexualising rape, pain, mutilation and degradation by one person (masculine/ male/dominant) on another person (feminine/ female/ submissive). These gendered hierarchies are presented as “normal” and “natural” in pornography and influence the perceptions of sex and gender of those who view pornography. The result is a society in which men have power and women, sexualised as unequal, are harassed and demeaned because they do not.

“The use of the word “model” or “actor” risks glamorizing the very real experiences of many of the people presented as “actors” and the reality that they, as real people do experience. The seriousness of this point should not be underestimated. Those who support gay male pornography tend to overlook that the “images/models” in gay male pornography are real people, upon many of whom direct physical contact, often in the form of violence presented through sex, is frequently inflicted in order to produce that which is defended as fantasy – a political euphemism or cover for abuse. It should not be assumed that these young men are always willing participants, particularly when free will is largely defined by one’s ability to exercise some social or economic independence. The young men who appear in gay male pornography do so for a number of reasons, but “choice” is not always a factor. This corresponds to the findings of those who have documented the lives of the women used in heterosexual pornography.”: Kendall, Christopher, N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 221 n 32

See also Abbott, Sharon A, “Motivations for Pursuing an Acting Career in Pornography” in *Sex for Sale: Prostitution, Pornography and the Sex Industry* (London: Routledge, 2000), 17; Giobbe, Evelina, “Surviving Commercial Sexual Exploitation” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 37

²⁴ See for example MacKinnon, Catharine A., *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 197. See also Dworkin, Andrea *Pornography: Men Possessing Women* (New York: Plume Books, 1989)

Whilst these harms have been identified as three distinct categories, they are by no means separate. Rather, they are interconnected and allow each other to perpetuate, with each informing and reinforcing the other. Each exists in harmony with the other. For example, if we lived in an equal society, in which men and women were equal, men would not want to use pornography and women would not be used in pornography. As stated at the beginning of this chapter, “in a non-sexist culture it would be shocking and intolerable to the community to view these images of women. In ours it is common place.”²⁵ In addition, in an equal society men would not be inspired and taught by pornography to harm and abuse women and children as the result of viewing it. On the other hand, pornography itself is instrumental in maintaining systemic gender inequality and sex discrimination by presenting women as dehumanised sexual objects who enjoy rape, pain and humiliation at the hands of men.

²⁵ Testimony of Cheryl Champion, Minneapolis Press Conference, quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 262

A. *Pornographic Harm 1: Harm to persons used in pornography*

Pornography uses and presents women as depersonalised sexual objects for male sexual pleasure. In pornography we see real women being degraded, tortured, beaten and humiliated. In many of the presentations of women, now mainstreamed via magazines, movies and the internet, the women are shown as enjoying this treatment. In others, the women used to produce these materials look like they are in real pain and distress.²⁶ Many are, while the message conveyed is that others should be. When discussing pornography, it is vital to recognise that “women in pornography are real women to whom something real is being done”²⁷ Their abuse, in turn, is sexualised in order to normalise the abuse of others. This abuse would not occur in a society premised upon equality. Pornography’s central harm is the inequality of the sexes. Pornography creates the inequality that allows men to use these women to mass market more inequality through sex.

Pornographers and pro-pornography activists argue that women freely choose to work in pornography. This merits closer examination. Some women are attracted to the pornography industry because they are trying to escape sexually and/or physically violent

²⁶ See generally Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993). In this book Russell provides commentary on over 100 pornographic photographs and cartoons. Many of the photographs show women bound, gagged, being raped, tortured, penetrated by objects and animals and in obvious pain and distress. The lack of consent by many of these women is obvious when viewing these photographs. Many of the cartoons trivialise and sexualise rape, sexual harassment in the workplace and sexual violence. See also Russell, Diana E.H., *Dangerous Relationships: Pornography, Misogyny, and Rape* (California: Sage Publications, 1998). In this book, Russell describes the pornography, instead of reproducing the actual photographs and cartoons, before analysing them from a harms-based equality perspective.

²⁷ MacKinnon, Catharine A., *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 199-190

homes.²⁸ Pornographers often them food, shelter, friendship and the means of earning an income.²⁹ A choice to enter the pornography industry in this context can hardly be seen as an informed one, but rather one that is necessary for survival. In addition, MacKinnon notes that many women enter the pornography industry as children and consequently queries the degree of “choice” available to these women³⁰ Claudia Martinez, for example, whose father forced her to perform in a pornography studio as a child, testified at the Massachusetts Hearings in 1992 as follows:

²⁸ Campbell, Bebe Moore, “A Portrait of an Angel: The Life of a Porn Star”, in Russell, Diana E.H. (ed) *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 32, 35. This article is an interview with “porn star” Angel Kelly where she where she revealed being sexually abused by her father when she was 11 years old. See also Kendall Christopher. N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 84 where Kendall discusses the fact that many young men who become gay male pornography “actors” have been sexually abused as children. See also Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 24 who discuss the fact the many women who later become involved in pornography are from abusive homes.

²⁹ Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 24

³⁰ MacKinnon, Catharine A., *Sex Equality* (New York: Foundation Press, 2001), 1537 See also Giobbe, Evelina, “Surviving Commercial Sexual Exploitation” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 37. Evelina Giobbe was forced into prostitution and pornography as a child. She stated at 38:

“The men who bought me – the tricks – knew I was an adolescent. Most of them were in their 50s and 60s. They had daughters and grand-daughters my age. They knew a child’s face when they looked into it. It was clear that I was not acting of my own free will. I was always covered with welts and bruises. They found this very distasteful and admonished me. It was even clearer that I was sexually inexperienced. So they showed me pornography to teach me and ignored my tears as they positioned my body like the women in the pictures and used me.”

Ms Giobbe later stated (at 39):

“A lot of people assume that women and girls like me consent to this abuse. Consent, however is not a possibility for a girl who was delivered into the hands of organised crime figures in New Jersey. Others wonder why I didn’t turn to the police. As a matter of fact, I didn’t have to walk to our local precinct to speak to the police. They were at our apartment every week for their payoff – me.”

“Between 1959 and 1964...I was one of several stars, if you will, at a porno studio where live sex acts between children and women and animals were enjoyed by a largely male audience...The porno studio I was subjected to was filled with evil and pain for me. I was humiliated and repeatedly raped. I was forced to perform fellatio on patrons in the bleachers in the audience. I was forced to smile as animals hurt my body.”³¹

Pornography is also made of women and children in their homes by family members, often without their consent or knowledge.³² Some women become involved in pornography because their fathers, brothers, boyfriends or other male relatives prostitute them and/or make pornography using them. Some of these women are photographed or filmed without their consent.³³ As one woman explained:

“My brother started sexually abusing me when I was 4 or 5 and pornography was a part of the abuse. To be specific, he would describe a certain pose that he had seen in Playboy or Penthouse, and he’d make me do it. Often he would compare my body to the pictures in a very detailed and graphic and humiliating way. He also became obsessed with a feature they have in Hustler. He told me it was called The Beaver Hunt, and men could send in photographs of their wives and their girlfriends...He thought that this was the greatest thing, that he could be a pornographer too, so he made me pose for The Beaver Hunt and took pictures.”³⁴

Pornographic “actors” are often not acting. Rather, they are real women who have been filmed or photographed being raped or sexually abused. Sue Santa, a social worker who worked exclusively with adolescent females and who gave testimony at the Minneapolis Hearings stated as follows:

³¹ Testimony of Claudia Martinez at the Massachusetts Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 402

³² Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 24

³³ Ibid

³⁴ Testimony of Lierre Keith at the Massachusetts Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987), 399

“...on many occasions, my clients are multi-, many-, rape victims. These rapes are often either taped or have photographs taken of the event. The young woman, when she tries to escape or leaves, is told that either she continues in her involvement in prostitution or those pictures will be sent to her parents, will be sent to the juvenile court, will be used against her. And out of fear, she will continue her involvement in prostitution. On several occasions, not many but several occasions, these young women have found that later that their pictures have been published in pornographic magazines without their knowledge and consent.”³⁵

E.M, a witness who gave testimony at the Minneapolis Hearings is an example of another woman used in pornography without her consent, drugged whilst attending a friend’s house for dinner. She recalls:

“What I remember is this. I am on the couch and everyone is looking at me, laughing. They are talking about – they started talking about taking pictures of me. I am not sure they took pictures. I passed out. I do remember flashing lights and what I do know is that they made and they sold pornography. What I remember next is being on the stage of this club...and there were two men that were holding me up and they were taking off my clothes. A third man was sexually fondling me. I saw a lot of faces in the audience and men were waving money. One of them shoved it in my stomach and essentially punched me. I kept wondering how it was possible that they couldn’t see that I didn’t want to be there, that I wasn’t there willingly.”³⁶

It is true that some women do choose to perform in pornography, mistakenly believing it to be a glamorous industry that will lead to a career in film or television.³⁷ Women may also be attracted by advertisements for “models”, “actresses” and “escorts” that do not mention

³⁵ Testimony of Sue Santa at the Minneapolis Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987), 176

³⁶ Testimony of E.M at the Minneapolis Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987), 104 - 105

³⁷ Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 24. See also the testimony of Sue Santa at the Minneapolis Hearings quoted in MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987), 176

the sexual component of the job.³⁸ The misconceptions women often have about pursuing a career in pornography are detailed by Abbott who conducted a study of “motivations for pursuing a career in pornography”.³⁹ Abbott interviewed participants involved in all aspects of the production of pornography “including producers, directors, company owners, magazine editors, agents, makeup artists, camera operators, and actresses and actors” in Los Angeles and San Francisco and identified five reasons why people enter the pornography industry.⁴⁰

The first reason for entering the pornography industry identified by Abbott is the attraction of making a lot of money.⁴¹ Abbott states that this perception is created by “trade and fan magazines that glamorize the industry by focusing on the lavish lifestyles of its members.”⁴² However, Abbott states that this perception is not the reality and that, “a few make a great deal of money while most make a modest or meagre living.”⁴³

The second reason many enter the pornography industry that is identified by Abbott is the motivation of “fame and glamour”.⁴⁴ Abbott reported that several “porn stars” she

³⁸ Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 23

³⁹ Abbott, Sharon A., “Motivations for Pursuing an Acting Career in Pornography” in Weitzer, Ronald (ed), *Sex for Sale: Prostitution, Pornography and the Sex Industry* (New York: Routledge, 2000), 17

⁴⁰ Id, 18-19

⁴¹ Id, 19

⁴² Id, 19-20

⁴³ Id, 20

⁴⁴ Id, 21

interviewed spoke of “being photographed, applauded, and having their autographs requested”.⁴⁵ Furthermore, fan clubs and fan magazines, black-tie parties to promote film releases and industry award nights give the appearance that fame and glamour are possible.⁴⁶

The third reason discussed by Abbott is that, “porn is appealing because it offers more flexibility and independence.”⁴⁷ Many said that they turned to the pornography industry because it offered more flexible hours and was not as demanding as having a conventional office job.⁴⁸

⁴⁵ In addition to attaining fame and glamour, another motivation for women entering the pornography industry is that it may lead to an acting career in mainstream film or television. However, the reality is that women used in pornography are often socially stigmatised and isolated which reduces the opportunities available to them entering a real acting career. In fact, it is very rare that someone used in pornography has been able to make a successful transition to television or film. See Dines, Gail, Jensen, Robert & Russo, Ann, *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998), 24:

“Defenders of pornography sometimes assume that women eagerly choose to participate in the industry out of a vast range of opportunities; they minimise the importance of unemployment, low and unequal pay based on sexism and racism, educational and employment opportunities...Young girls and women make decisions to work in the pornography industry, but the contexts of their decisions are not ones of economic opportunity and social freedom; their decisions are not socially neutral. Economic necessity, limited economic and educational opportunities, and sexual abuse, among other social factors, often compel women...into sex work, in contrast to other jobs, because on the surface it seems very lucrative. Some young women enter the industry in response to false advertising and promises of future wealth. As Evelina Giobbe points out, “in the same way naive young women are lured into prostitution through ads for ‘Escort Services’ which omit mentioning the sexual component of the ‘job,’ others are lured into pornography by misleading advertisements for ‘models’ or ‘actresses.’ They may be told that such modelling will be a stepping stone to a better acting career. Once in the industry, however, women are socially stigmatised and isolated, which reduces the span of opportunities available to them.”

⁴⁶ Id, 21-22

⁴⁷ Id, 22-23

⁴⁸ Id, 23

Abbott describes the fourth reason that people enter the pornography industry as “opportunity and sociability”.⁴⁹ What Abbott means by this is that many enter the pornography industry because they are introduced to it by “friends, lovers and co-workers”.⁵⁰ Then when working in the industry, new friendships and contacts are made with professional “stars” often being given the opportunity to select their co-stars.⁵¹ In addition, Abbott reports that if a person is working in another section of the sex industry, such as stripping, contacts can be made that can also lead to an opportunity to pursue a career in pornography.⁵²

The final reason for entering the pornography industry is identified by Abbott as “being naughty and having sex”.⁵³ Abbott reports that a number of her respondents stated that pornography “offered them a chance to snub the prevailing norms of acceptable sexuality” and was “also a vehicle for people who wish to violate, challenge and refute social norms.”⁵⁴ The pornography industry also appealed to those who had a “desire to be ‘naughty’” and, particularly in the case of male “actors” gave them an opportunity to have sex.⁵⁵

⁴⁹ Id, 24

⁵⁰ Ibid

⁵¹ Id, 25

⁵² Ibid

⁵³ Id, 26

⁵⁴ Ibid

⁵⁵ Id, 26-27

Despite this, it must be pointed out that, even if one woman's expectations upon entering the pornography industry are fulfilled (for example, if the desire for fame and glamour is realised), this positive experience does nothing to redress the harm and sexual exploitation experienced by other women working within the pornography industry. Kendall explains:

“...simply because one woman does not experience harm does not mean that another woman has not been harmed. Nor does the fact that one woman has not been harmed mean that another woman who has been should not be afforded legal protections and a safe forum within which to talk about her experiences without being accused of lying or misleading the public. To the extent that one woman *is* harmed in the name of sexual freedom and speech, those who support the industry because it benefits them arguably have a responsibility to ensure that steps are taken to guarantee that abuse and inequality *do* become a fiction.”⁵⁶

MacKinnon and Dworkin have commented that women's “free choice” to work in pornography is made in the context of inequality. A choice made in such a context can hardly be said to be a free one.⁵⁷

“[the] first victims of pornography are those in it. Pornography indelibly makes those it uses into its presentation of them, so that no matter who they say they are or what they say about how they really felt, to those who have seen them in pornography, they are pornography for life...Pornographers promote an image of free consent because it is good for business. But most women in pornography are poor, were sexually abused as children, and have reached the end of this society's options for them, options that were biased against them as women in the first place. This alone does not make them coerced for purposes of the Ordinance; but the fact that some women may “choose” pornography from a stacked deck of life pursuits (if you call a loaded choice a choice, like the “choice” of those with brown skin to pick cabbages or the “choice” of those with black skin to clean toilets) and the fact that some women in pornography say they made a free choice does not mean that women coerced into pornography are not coerced.”

⁵⁶ Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 75

⁵⁷ MacKinnon, Catharine A., & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1989), 42-43

Linda Marchiano (known in pornography as Linda Lovelace) in her book *Ordeal*⁵⁸, gave graphic details of how she was coerced into pornography by Chuck Traynor, her husband and pimp, and of the immense psychological and physical harm she suffered as a result.

Whilst the abuse Ms Marchiano suffered may appear extreme, her story illustrates the ease in which a young, naïve woman can be coerced into the pornography and prostitution industries by actual violence, the threat of violence to Ms Marchiano personally and to her family and friends, and psychological abuse. Her story also reveals a callous industry, premised upon profit at the expense of basic human dignity.

Ms Marchiano's ordeal began when she was 21 years old and staying with her parents to recover from a serious car accident. A high school friend came to visit her with a man named Chuck Traynor who Ms Marchiano initially thought was attractive, interesting and a gentleman.⁵⁹ Ms Marchiano's wrote in *Ordeal*, that her mother had a violent temper, and after an argument with her mother, in which her mother hit her, she was persuaded by Traynor that she could live with him until she recovered from her car accident.⁶⁰

At the time she went to live with Traynor, Ms Marchiano knew very little about him. She did not know that he had a police record, including being found guilty of assault and battery, that he was facing charges of drug importation, and that he had previously run a

⁵⁸ Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980). See also Steinem, Gloria, "The Real Linda Lovelace" in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 23

⁵⁹ Id, 19-20

⁶⁰ Id, 19-21

brothel.⁶¹ Ms Marchiano also reported that as their relationship progressed, Traynor would boast to her about people he had killed.⁶²

Ms Marchiano reported that some time later, Traynor began to have financial difficulties and told Ms Marchiano that he was going back into the prostitution industry and that she should run his prostitution business with him as his “Madam”. When Ms Marchiano refused, Traynor brutally beat and raped her.⁶³ Ms Marchiano reported that from this time, Traynor became more possessive and violent towards her, ordering her around and openly displaying and cleaning his guns in order to threaten her.⁶⁴

Ms Marchiano wrote that one day, Traynor informed her that they were going to meet some people. He drove her to a motel and took her into a room in which there were five men waiting.⁶⁵ On returning from the room’s bathroom, Ms Marchiano wrote that Traynor informed her, “you know those five guys out there...you’re going to fuck all five of them.” When Ms Marchiano made several refusals, she was told by Traynor, “If you don’t, I’m going to put a bullet in your head right now”⁶⁶ and “Take off your clothes or you are one fucking dead chick!”⁶⁷ Ms Marchiano was raped and sexually abused by four or the five

⁶¹ Id, 19-20

⁶² Ibid

⁶³ Id, 34-35

⁶⁴ Id, 37-38

⁶⁵ Id, 38-39

⁶⁶ Id, 41

⁶⁷ Id, 42

men, with the other man and Traynor watching. She writes of this ordeal, “I had never been so frightened in my life”⁶⁸ and “I wouldn’t have minded dying”.⁶⁹

After this incident, Traynor began to pimp Ms Marchiano out more and more. He ensured that she would not escape with threats of cutting up her face⁷⁰ and threats of violence, actual violence and verbal abuse:

“Every day I either got raped, beaten, kicked, punched, smacked, choked, degraded or yelled at. Sometimes, I got all of the above. Strangely enough, what bothered me the most was the endless verbal abuse. He never let up...”⁷¹

Traynor took Ms Marchiano to her first pornographic photography session at the home of pornographer Leonard Campagno (also known as “Lenny Camp”). She was made to have sex with another woman, including being penetrated by the woman wearing a strap on dildo.⁷² Ms Marchiano described this experience as “one of the lowest spots in my life.”⁷³

Ms Marchiano felt at all times that she had no choice but to perform in pornography. She commented, “the things that he used to get me into pornography went from a .45 automatic 8 shot and M-16 semi-automatic machine gun to threats on the lives of my family.”⁷⁴

⁶⁸ Id, 45

⁶⁹ Id, 46

⁷⁰ Id, 51

⁷¹ Ibid

⁷² Id, 58

⁷³ Id, 59

⁷⁴ Testimony of Linda Marchiano at the Minneapolis Hearings quoted in MacKinnon, Catharine A., & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987), 61

Ms Marchiano wrote that at first she was fearful of escaping from Traynor, and instead focused on survival. She wrote:

“At first I was certain that God would help me escape but in time my faith was shaken. I became more and more frightened, scared of everything. The very thought of trying to escape was terrifying. I had been degraded every possible way, stripped of all dignity, reduced to an animal and then to a vegetable. Whatever strength I had began to disappear. Simple survival took everything: making it all the way to tomorrow was a victory.”⁷⁵

Shortly afterwards Ms Marchiano made her first escape attempt when she was sent to an apartment with another woman on a prostitution job. Ms Marchiano tried to run away but was caught by Traynor at the bottom of the apartment. She wrote that her punishment was so bad that she blocked it from her memory:

“I remember being icy with fear. However, whatever Chuck did to me that afternoon – the details – are gone from my memory. They’re completely blocked. I can’t remember a word that he said. I don’t remember him throwing a punch or hitting me, but I do know it was the worst beating I ever got. It was a day before I could walk again.”⁷⁶

Ms Marchiano made her second escape attempt on a visit to her parent’s house. However, she changed her mind after Traynor threatened to kill her young nephew, father, mother and sister if she didn’t stay with him.⁷⁷

In *Ordeal*, Ms Marchiano wrote that Traynor decided that she should do pornographic films. She named the first film she was made to do “the piss movie” because it ended with

⁷⁵ Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980), 70

⁷⁶ Id, 74

⁷⁷ Id, 85-87

the “actors” urinating on each other.⁷⁸ Ms Marchiano wrote that she was “disgusted” by the film⁷⁹ and described the way she learnt to cope as follows:

“In time I learned a thing or two. I learned a false smile was a lot better than a real beating, so I’d just paste that smile on my face no matter what was happening. I also learned that if I didn’t get into it quickly, then I’d have to be at it longer. So I got right into it, did it quickly, smiled all the time and got it over with. Later, in the shower, I would tell myself that it hadn’t really happened.”⁸⁰

Traynor’s next pornographic film for Ms Marchiano was what Ms Marchiano described as the “dog movie”.⁸¹ She refused to do the film, saying, “I’d rather take the beating”⁸² but she was informed by Traynor that she must do the film, otherwise he would kill her.⁸³ Ms Marchiano wrote in *Ordeal* that Traynor, the film’s director and the director’s assistant were insistent that she change her mind:

“Mr Traynor suggested the thought that I do films with a D-O-G, and I told him that I wouldn’t do it. I suffered a brutal beating. He claims he suffered embarrassment because I wouldn’t do it. We then went to another porno studio, one of the sleaziest ones I have ever seen, and then this guy walked in with his animal, and I again started crying. I said, I am not going to do this, and they were all very persistent, the two men involved in making the pornographic film and Mr Traynor himself. And I started to leave and go outside of the room where they make these films, and when I turned around there was all of a sudden a gun displayed on the desk and having seen the coarseness and callousness of the people involved in pornography, I knew that I would have been shot and killed. Needless to say, the film was shot and still is one of the hardest ones for me to deal with today.”⁸⁴

⁷⁸ Id, 105

⁷⁹ Id, 104

⁸⁰ Id, 104-105

⁸¹ Id, 107

⁸² Id, 110

⁸³ Ibid

⁸⁴ Id, 111. See also Testimony of Linda Marchiano at the Minneapolis Hearings quoted in MacKinnon, Catharine A., & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987)

Ms Marchiano also of the humiliation she suffered as a result of being used in this film saying, “If I could have foreseen how bad it was going to be, I wouldn’t have surrendered. I would have chosen the possibility of death.”⁸⁵

Ms Marchiano was later made to perform in the film *Deep Throat*. The film was about a woman who had a clitoris in the back of her throat. So that Ms Marchiano could manage the fellatio in the film without “gagging”, Traynor used hypnosis to inhibit the gag reflex.⁸⁶

At the Civil Rights hearing in Minneapolis, Ms Marchiano testified how she was severely beaten by Traynor while the film was being made:

“During the filming of *Deep Throat*, actually after the first day, I suffered a brutal beating in my room for smiling on the set. It was a hotel room and the whole crew was in one room...Mr Traynor started to bounce me off the walls. I figured out of 20 people, there might be one human being that would do something to help me and I was screaming for help, I was being beaten, I was being kicked around and again, bounced off the walls. And all of a sudden the room next door became very quiet. Nobody, not one person came to help me. The greatest complaint the next day is the fact there was bruises on my body. So many people say that, in *Deep Throat*, I have a smile on my face, and I look as though I am really enjoying myself. No one ever asked me how those bruises got on my body.”⁸⁷

When asked at the Civil Rights Hearings how she felt about the fact that *Deep Throat* continued to be shown Ms Marchiano said, “virtually every time someone watches that film, they are watching me being raped.”⁸⁸

⁸⁵ Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980), 111

⁸⁶ Testimony of Linda Marchiano at the Minneapolis Hearings quoted in MacKinnon, Catharine A., & Dworkin, Andrea, *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987)

⁸⁷ Id, 62

⁸⁸ Id, 65

Ms Marchiano made her third unsuccessful escape attempt after *Deep Throat*. Traynor arranged a brutal punishment, namely for Ms Marchiano to be brutally raped by another woman with a dildo which she described as “the most intense pain I’d known.”⁸⁹ Ms Marchiano eventually did escape from Traynor by convincing him, for the first time, to leave her alone for several hours.⁹⁰

There can be no doubt that Ms Marchiano suffered severe physical and psychological harms at the hands of, and for the benefit of, the pornography industry. This is evidenced by films such as the “dog movie” where the director and his assistant were complicit with Traynor in forcing Ms Marchiano to do the film upon threat of death and *Deep Throat*, during which no one came to assist her when she was being brutally beaten. The pornography industry allowed Traynor to make money from abusing and degrading his wife. It was an industry that asked no questions about consent, even in the face of Ms Marchiano’s obvious lack of it, nor cared, as long as the pornography was made and sold for a profit. Ms Marchiano continues to be exploited by the pornography industry today. An internet search using the search engine “Google” of the name “Linda Lovelace” revealed 543,000 hits in 0.05 seconds.⁹¹ This is a dramatic increase from the number of hits revealed by a “Google” search conducted approximately one year earlier which resulted in 97,000 hits in 0.09 seconds.⁹²

⁸⁹ Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980), 162

⁹⁰ Id, 220-222

⁹¹ The “Google” web page is located at www.google.com.au . The search for “Linda Lovelace” was conducted on 9 July 2005

⁹² This “Google” search was conducted on 25 June 2004

It is questionable whether pornography “actors” are well paid, given the physical harm that is inflicted on their bodies by the acts that they are required to undertake in front of the camera. In any event, even if some of the women used in pornography are well paid, this does not alter what pornography is and does to many women and children, nor does it alter the inequality pornography perpetuates. Being well paid does not lessen any physical harm caused during production or the psychological harm often suffered by women and children who are made to perform in pornography. Money does not make up for the fact that pornography teaches men that women are inferior, existing only to be sexually submissive to men. Money does not make up for the myths pornography perpetuates, such as myths that women enjoy being raped, that “no” means “yes” and that the unequal treatment of women is the natural order of things.

There is also a substantial risk to actors of contracting sexually transmitted diseases. Torres has commented on the unsafe sexual practices in the context of pornographic films:

“The nature of adult motion picture production encourages unusual and unsafe working conditions. Producers have been known to force actresses to do sexual acts ‘that they would really rather not do.’ In most of the productions, producers do not test the performers for sexually transmitted diseases and do not require that performers practice safe sex. Additionally, some producers ignore the risks associated with allowing a performer, who may be infected with HIV, to perform in a film. In these situations, the performers are faced with the greatest risk of contracting AIDS.”⁹³

⁹³ Torres, Francisco G., “Lights, Camera, Actionable Negligence: Transmission of the AIDS Virus During Adult Motion Picture Production” [1990] 13 *Hastings Communication and Entertainment Law Journal* 89, 99

Torres also gives the example of John Holmes, a famous pornography “actor”, who died of AIDS related complications in March 1988. Holmes continued working in the pornography industry, even though many in the industry knew he was HIV positive.⁹⁴ In doing so, he (and the industry) knowingly endangered the lives of hundreds of women.

The disdain the pornography industry generally has for condoms is indicative of the sexualisation of risk in pornography. There is a category of pornography described by Torres as “safe sex films”⁹⁵ where condoms and dental dams are used. However, these films are rare and do not enjoy the popularity of other types of pornography. Pornography depicts violent and potentially harmful behaviours as sexy, legitimate and enjoyable. More significantly, pornography sexualises inequality by presenting women as sexual objects who enjoy pain, mutilation and rape and who are submissive to men. Any kind of protection from harm would contradict the sexualisation of inequality in pornography. Kendall⁹⁶ comments in the context of gay male pornography:

“...it is clear that in many ways safe sex stands to emasculate the pornographic symbol. For safe sex to work, one needs to accept that both parties have rights and that both are sexual equals. Both parties merit protection and more importantly, both have the right to a recognised human existence. In a sense, safe sex represents a form of sexual negotiation, imposing limits on sexual conduct – negotiation that presupposes relatively equal parties. More importantly, however, it recognises that there are limits on what you can do to someone else through sex and what they, in turn, can do to you.”

⁹⁴ Ibid

⁹⁵ Id, 97

⁹⁶ Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 147

As indicated above, there are some women who do freely choose to join the pornography industry, such as Grace Quek, known in the pornography industry as Annabel Chong. Even amongst this group of women, however, the reality of what they are doing soon makes them question this choice. Chong's career as a pornography "actor" is examined in the documentary film, "*Sex: The Annabel Chong Story*." The documentary shows Chong to be an educated woman who achieved a degree from the University of Southern California and who reports that she had a happy childhood in Singapore. Chong became involved in the pornography industry whilst a student. In the documentary, Annabel says the following during a tutorial:

"I am a porn actress and soon I'll be producing, directing, videos, and um, what's interesting, what I find really interesting is, I think, that there is not enough knowledge, um, in the field of sex research, um, in the field of pornography because everyone's just, it's so taboo, that I feel that it's an area that's worth looking into."

A friend of Chong's stated the following when asked in the documentary about Chong's reasons for entering the industry: "The way I heard it from her is that she was kind of pissed off in a feminist theory class which I can see happening very easily...she felt very, kind of, bombarded with this kind of reverse patriarchy, and ah, she ran out and did a porno, just to prove a point."

Although Chong appeared to enter into the pornography industry with a feminist agenda to prove that women could enjoy sex as much as men, that women could be empowered and affirm their sexuality through casual sex, Chong's experiences in the pornography industry, and the industry's perception of her show that Chong's feminist agenda was defeated by the industry. For example, Ed Powers, described in the documentary as the "star and producer"

of one of Chong's films, "More Dirty Debutantes" said of his plans for Chong: "I just wanted to take this girl, with an English accent and an Asian look and ah, make her the nastiest object, sexual object, that's what I feel was the goal thereafter..."

Chong is most famous for doing the first "World's Biggest Gangbang" in which she had oral, vaginal and anal sex with 251 men, usually five men at a time. It is interesting to note the reference to "equal opportunity" in the video advertisement for the gang bang:

“
WANTED
300 men to participate in the world's largest equal opportunity gang bang.
Location: Los Angeles
Date: January 1995”

The documentary shows the gangbang film's director, in an interview, calling for men to participate in the gang bang. The following statement by the director objectifies Chong and is shown in the documentary as the beginning of her loss of control over the process of making the film and her objectification. It is also an indication of the loss of Chong's feminist agenda:

“Right now, in fact we've got a nationwide search for 300 guys that want to come in and fuck her. [To Chong] Why don't you stand up sweetheart and take your clothes off and let the people see what they want to fuck. Here's a chance for you guys at home. If you want to fuck this girl, write to us...”

The documentary also shows Chong being interviewed on a British television show called "The Girlie Show". When asked why she did the "World's Biggest Gangbang" Chong said:

“For that particular video, it's a piss take on the whole notion of masculinity, right, the whole notion that a guy just goes around shagging all these women, you know,

the more the better, you know, he's a stud. So I have decided to take on the role as a stud and see how people react to it."

The effect of the "World's Biggest Gangbang" was not, it is submitted, to make Chong a "stud", but rather to make her a passive object, lying on a podium, to be penetrated by five men at a time. Chong was not empowered as a "stud", rather she was passively acted upon and was visibly in great pain by the end of the gangbang. Chong was also exposed to the risk of contracting the HIV virus or other sexually transmitted diseases and was under the "false impression" that all participants in the gangbang had been tested for HIV and AIDS. Furthermore, Chong was never paid the agreed \$10,000 US for the gangbang, although she stated in the documentary that she did not want to be paid:

"I was supposed to get \$10,000 for it but um due to ah, a lot of contractual difficulties with the split in companies, I never got the money but I never really pursued it because I thought, you know, its mugs money, it doesn't belong to me. The act itself took place between me and these guys. We're doing it for free, and uh, why should I get paid for it?"

During her career, the documentary shows that Chong frequently used drugs. Chong also suffered alienation from her mother and felt ashamed when her mother found out about her working in pornography. The use of drugs and Chong's feelings of shame and desire to win back her mother's respect undoubtedly negatively influenced Chong's negative feelings of self worth. The documentary shows a depressed Chong, cutting up her arm with a knife and saying: "Sometimes there's a pain inside you can't let out because you're so numb – because life makes me so numb – you just gotta feel something."

Despite her original feminist agenda, Chong appeared to be an emotionally disturbed woman, objectified and exploited by the pornography industry, with very little benefit, financial or otherwise from her involvement in pornography.⁹⁷

In conclusion, many of the “actors” used in pornography do not freely choose to enter the industry, having been involved in the industry since childhood, or having been coerced into pornography by family members or boyfriends, often without their consent. If women used in pornography do make a choice to enter the pornography industry, it also appears that the choice is not an informed one and is often made under financial pressure, due to lack of opportunities in employment and education, misconceptions that the industry is glamorous

⁹⁷ Whilst the preceding analysis is primarily focused on women and children used in heterosexual pornography, men and women used in gay and lesbian pornography often have similar experiences of exploitation, objectification and powerlessness. Many, young gay men according to Kendall become involved in the pornography industry because they have been forced to leave home at a young age when their parents have found out they are gay, giving them little opportunity to complete their education and leaving the prostitution and pornography industry as one of the few ways of earning an income: See Kendall, Christopher. N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 78.

By way of example, Kendall (at 76-83) discusses the life of 1990's gay pornography “actor” Nicholas Iacona, known in pornography as Joey Stefano. Stefano ran away from home when he was 15 years old and soon became involved in the pornography industry. He made over 35 hard-core pornographic videos. Stefano also became involved in prostitution. He hoped that it would lead to more legitimate television and film roles which many of the men who used him promised they would help him obtain. Stefano died of a drug overdose on 20 February 1994. He was broke, depressed and HIV positive. Joey Stefano quoted in Isherwood, Charles *Wonder Bread and Ecstasy: The Life and Death of Joey Stefano* (Los Angeles: Alyson Publications, 1996) in Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 69 wrote:

“No job
 No money
 No self-esteem
 No confidence
 All I have is my looks and body,
 And that's not working anymore.
 I feel washed up.
 Drug problem.
 Hate Life.
 HIV-positive.”

or lucrative or that it may lead to a career in film or television. The reality soon dispels these myths.

B. *Pornographic Harm 2: Sexual Harm to Non-actors*

“I was sexually abused in my family. I don’t know if the man who abused me uses pornography, but looking at the women in those pictures, I saw myself at fourteen, at fifteen, at sixteen. I felt the weight of that man’s body, the pain, the disgust...I don’t need studies and statistics to tell me that there is a relationship between pornography and real violence against women. My body remembers.”⁹⁸

For women and children who have been raped and sexually abused, there is often no question that there is a direct correlation between the harm they have suffered and pornography. However, pro-pornography activists⁹⁹ deny that pornography causes *any* kind of harm. They argue that any harm to women is caused through censorship and that pornography should not be denied those who want it. For them, censorship laws aimed at

⁹⁸ Testimony of MMD quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 134-135

⁹⁹ See for example, Strossen, Nadine, *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights* (New York: Scribner, 1995); Strossen, Nadine “Hate Speech and Pornography: Do we have to choose between Freedom of Speech and Equality?” (1995-1996) 46 *Case W. Res. L. Rev.* 449; Strossen, Nadine, “Preface: Fighting Big Sister for Liberty and Equality” (1993) 38 *N.Y.L Sch. L. Rev.* 1. See also Hunter, Nan and Law, Sylvia, “Brief Amici Curiae of Feminist Anti-Censorship Task Force” (1988) 21 *Michigan Journal of Law Reform*, 69 at 86 who opposed the Indianapolis Ordinance on the following grounds:

“Sexually explicit speech is not per se sexist or harmful to women. Like any mode of expression, it can be used to attack women’s struggle for equal rights, but it is also a category of speech from which women have been excluded. The suppression authorized by the Indianapolis ordinance of a potentially enormous range of sexual imagery and texts reinforces the notion that women are too fragile, and men too uncontrollable, absent the aid of the censor, to be trusted to reject or enjoy sexually explicit speech for themselves. By identifying ‘subordination of women’ as the concept that distinguishes sexually explicit material which is tolerable from that to be condemned, the ordinance incorporates a vague and asymmetric standard for censorship that can as readily be used to curtail feminist speech about sexuality, or to target the speech of sexual minorities, as to halt hateful speech about women. Worse, the perpetuation of the concept of gender-determined roles in regard to sexuality strengthens one of the main obstacles to achieving real change and ending sexual violence.”

regulating pornography have traditionally been used by men to silence women's voices and women's sexual expression.¹⁰⁰

It is submitted that just because censorship legislation has been used to silence women, this should not preclude pornography from being regulated in a manner that does not involve the silencing of legitimate, non-harmful expression. Despite this, alternative legal frameworks for regulation, such as MacKinnon and Dworkin's sex equality approach, have been discredited by the likes of Nadine Strossen as a form of censorship. What these pro-pornography writers fail to realise, however, is that the failure to regulate pornography at all is *itself* a form of censorship. As MacKinnon and Dworkin argue, pornography acts as a form of censorship by silencing women and making them unable to speak out.¹⁰¹ It

¹⁰⁰ Ibid

¹⁰¹ MacKinnon, Catharine A., "Pornography, Civil Rights and Speech" (1985) 20 *Harv. C.R.-C.L.L. Rev.* 1 at 36 where MacKinnon describes how pornography silences women:

"Pornography makes their speech impossible and where possible, worthless. Pornography makes women into objects. Objects do not speak. When they do, they are by then regarded as objects, not as humans, which is what it means to have no credibility."

Dworkin, Andrea, "Against the Male Flood: Censorship, Pornography, and Equality" (1985) 8 *Harv. Women's L.J.* 1 at 17-20 for a discussion of how part of pornography's subordination is to silence women. Dworkin argues that pornography not only silences women, but that it goes even further; it allows women's bodies to be used as pornographers' speech: "The pornographers actually use our bodies as their language. Our bodies are the building blocks of their sentences." (at 18)

See also Griffin, Susan, *Pornography and Silence: Culture's Revenge Against Nature* (New York: Harper & Row, 1982). Griffin argues (at 1) "that pornography is an expression not of human and erotic feeling and desire, and not of a love of the life of the body, but of a fear of bodily knowledge and a desire to silence eros." She argues (at 3) that "The pornographer reduces a woman to a mere thing, to an entirely material object without a soul..." Griffin argues that throughout history, women have been silenced, and that pornography is a part of this "forced silencing" of women (at 201). Griffin states (at 201-202):

"And the story does not end with this forced silencing. Just as silence leaves off, the lie begins. This lie is not only the lie the pornographer tells, but the lie a woman begins to believe about herself, or even if she does not believe it, the lie a woman tries to mimic. For since all the structures of power in her life, and all the voices of authority – the church, the state, society, most likely even her own mother and father – reflect pornography's fantasy, if she feels in herself a being who contradicts this fantasy, she begins to believe she herself is wrong. Wordlessly, even as a small girl, she begins to

therefore ensures that male views are those most likely to be voiced. The result is inequality on the basis of sex; a gendered hierarchy in which “male” is to “female” as dominance is to submission. By discrediting or refusing to believe women’s narratives of harm, pro-pornography feminists silence these women in the same way that men always have. In addition, denying that actual harm was suffered by these women reinforces pornography’s message: “they want it; they all want it”.¹⁰²

The MacKinnon and Dworkin civil rights hearings gave women the opportunity to break their silence. Many of them did so in fear of their lives and in the hope that the ordinance would be enacted, thereby giving other women harmed by pornography a voice that they did not have, and the right to obtain compensation for sexual abuse and violence, including the right to injunctive relief and to stop pornography made of them being shown, sold and distributed. The testimony of several women at the civil rights hearings indicated that pornography played a causal role in their abuse by strangers. For example, Ms M testified at the Minneapolis Hearing as follows:

“When I was thirteen, I was camping with the Girl Scouts...I was walking in the forest outside of the camp in midafternoon and came upon three deer hunters who were reading magazines and talking and joking around. I turned to walk away and one of the men yelled, “There is a live one.” And I thought they meant a deer, and so I ducked and tried to run away. I realised that there wasn’t any deer in sight and that they meant me. And I started running and they ran away – they ran after me. I tripped...and they caught me. They told me to take off my clothes and I did...I took my clothes off, and they told me to lie down and the first man started. They told me not to say anything, that if I made a sound they would kill me, they would blow my head off...two men held their guns at my head and the first man hit my breast with his rifle, and they continued to laugh. And then the first man raped me.

try to mould herself to fit society’s image of what a woman ought to be. And that part of her which contradicts this pornographic image of womanhood is cast back into silence.”

¹⁰² MacKinnon, Catharine A., *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987), 191

And when he was finished, they started to make jokes about how I was a virgin...The second man then raped me...When the second man finished, the third man was not able to get an erection, the other men, told me to give him a blow job, and I didn't know what a blow job was. The third man forced his penis into my mouth...He started swearing at me and calling me a bitch and a slut and that I'd better do it right and that I wasn't even trying. Then he started getting very angry and one of the men pulled the trigger on his gun, so I tried harder. Then when he had an erection, he raped me...Then they started walking away...and I looked down and saw that they had been reading pornographic magazines. They were magazines with nude women on the covers."¹⁰³

Ms M's testimony shows a direct relationship between the pornography her attackers were reading and their brutal rape and sexual assault on her. Carol LaFavour, an American Indian woman, also testified at the hearings that her attackers referred to a pornographic video game called "Custer's Last Stand" during their attack on her:

"I was attacked by two white men, and from the beginning they let me know that they hated my people, even though it was obvious from their remarks they knew very little about us. And they let me know that the rape of a 'squaw' by white men was practically honoured by white society. In fact, it has been made into a video game called, 'Custer's Last Stand.' And that is what they screamed into my face as they threw me to the ground, 'This is more fun than Custer's Last Stand'. They held me down and as one was running the tip of his knife across my face and throat he said, 'Do you want to play Custer's Last Stand? It's great. You lose, but you don't care, do you? You like a little pain, don't you, squaw?'...They made other comments- 'the only good Indian is a dead Indian,' 'a squaw out alone deserves to be raped' – words that still terrorise me today."¹⁰⁴

The American case of *State v Herberg*¹⁰⁵ is a record of an horrific sexual assault and torture in which the perpetrator acted out content in several pornographic books including "Violent Stories of Kinky Humiliation", "Violent Stories of Dominance and Submission", "Bizarre

¹⁰³ Testimony of Ms M quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 102-103

¹⁰⁴ Testimony of Carole LaFavour quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 148

¹⁰⁵ *State v Herberg* 324 N.W.2d 346, 347 (Minn. 1982) discussed in Pacillo, Edith L. "Note: Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography" (1994) 28 *Suffolk U. L. Rev.* 123, 123

Sex Crimes”, “Shamed Victims” and “Watersports Fetish: Enemas and Golden Showers”.¹⁰⁶ Pacillo summarises the case as follows:

“On July 17, 1981, David Herberg forced a 14-year-old girl into his car, tied her hands with his belt, and pushed her to the floor. With his knife, he cut her clothes off, then inserted the knife into her vagina, cutting her. After driving a short distance, he forced the girl to remove his clothing, stick a safety pin into the nipple of her own breast, and ask him to hit her. He then orally and anally raped the girl. He made her burn her own flesh with a cigarette, defecated and urinated in her face, and compelled her to eat the excrement and to drink her own urine from a cup. He strangled her to the point of unconsciousness, cut her body several times, then returned her to the place where he had abducted her. In reviewing Herberg’s criminal appeal, the Supreme Court of Minnesota noted that when Herberg committed these acts, he was ‘giving life to some stories he had read in various pornographic books.’ Officials seized these books from him during his arrest.”¹⁰⁷

Pornography not only has a role in sexual assaults by strangers. It also causes sexual abuse and violence in the home. Pornography is often used against women by boyfriends and family members as a manual for their abuse. Katherine Brady, a victim of incest, writes:

“My father incestuously abused me for a period of 10 years, from the time I was 8 years old until I was 18...During the early stages of the molestation, my father used pornographic materials as a way of coercing me into having sex with him...My father used pornography for several purposes. First of all, he used it as a teaching tool – as a way of instructing me about sex and about what he wanted me to do with him. When he showed me the pictures, he would describe the acts in detail: ‘This is fellatio,’ ‘this is what you do with intercourse,’ and so forth. Second, my father used the pictures to justify his abuse and to convince me that what we were doing was normal. The idea was that if men were doing it to women in the pictures, then it was OK for him to do it to me. Finally, he used the pornography to break down my resistance. The pornography made the statement that females are nothing more than objects for men’s sexual gratification. How could I refuse my father when the pornography showed me that sex is what women and girls are for?”¹⁰⁸

¹⁰⁶ Pacillo, Edith L. “Note: Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography” (1994) 28 *Suffolk U. L. Rev.* 123, fn1

¹⁰⁷ *Id.*, 123

¹⁰⁸ Brady, Katherine, “Testimony on Pornography and Incest” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 43-44

Note also the testimony of L.B at the Massachusetts Hearings who stated that:

“He wanted me to watch how the various women in the video performed oral sex on the men. And then he insisted that I do the same with him while he continued to watch that movie. If I didn’t go down on him far enough or hard enough, he would put his hands on my head and push it up and down, sometimes so hard that I thought I would faint. If I gagged or choked, he would pull me up by the hair, throw me back on the floor, hit and kick me and verbally abuse me, calling me ‘worthless,’ ‘useless,’ and ‘a waste of his time.’ Then he would make me watch that video again, perform oral sex, and threaten to ‘break my jaw if I stopped.’”¹⁰⁹

In addition, a woman named Suzanne Fuller also testified that she was made to repeat what the women did to the men in pornographic videos:

“He forced me to watch porn flicks, insisting that I should like them, learn from them, and be like those women, so I could please him. He would always be forceful in intercourse after viewing these porn videos. He insisted that I repeat what the women did, as he repeated what the man did. He would hit me as he forced me. I felt humiliated, terrified. I was his sex slave. He showed me a picture of a woman, it was either from Penthouse or Playboy, and he said that he believed that she was me. Later, he told me that his deepest fantasy was to rape me, which he did repeatedly.”¹¹⁰

Another woman, Pat Haas, testified of the role pornography played in her abuse, in particular, how she was forced to perform the acts seen in pornography:

“I was forced to provide videos for him. He found one particular one very appealing. It was about sadomasochism. He spent hours watching this movie and he then started forcing me to do the things that were in this movie. One night, I spent an evening with him. I had hot wax dripped on me. A couple of weeks later, I was forced to pierce my nipples, I was forced to have sex with other people, it didn’t make any difference – men, women, groups. He had me playing watersports games, which is drinking urine. And every time I said no, he would find a way of beating me. Most of the time it was with a two inch belt. He had knives at my throat; he tried strangling me on occasion.”¹¹¹

¹⁰⁹ Testimony of LB quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 381

¹¹⁰ Testimony of Suzanne Fuller at the Massachusetts Hearings quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 407

¹¹¹ Testimony of Pat Haas at the Massachusetts Hearings quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 370

Several women made direct reference to pornography being used as a “text book” for their abuse at the civil rights hearings such as R.M.M who testified at the Minneapolis Hearings that:

“He would read from the pornography like a text book. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots, and how to bind me in a way that I couldn’t get out. And most of the scenes that we – most of the scenes where I had to dress up or go through different fantasies – were the exact scenes he had read in the magazines.”¹¹²

Women working in male dominated trades have also been subjected to workplace harassment through the display of pornography in the workplace by male co-workers. In the Western Australian case of *Horne & Anor v Press Clough Joint Venture & Anor*¹¹³ delivered on 26 November 1993, it was held by the Equal Opportunity Tribunal of Western Australia that pornography predominantly displayed at a male dominated work site constituted sex discrimination and victimisation in the work place. I will return to this case in chapter 4 where I will use the case as a case study of how the ordinance can be implemented in practice to actually address harm.

¹¹² Testimony of RMM at the Minneapolis Hearings quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm’s Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 113-114. See also Giobbe, Evelina, “Surviving Commercial Sexual Exploitation” in Russell, Diana E.H. (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993), 37 where she stated at 39:

“My last pimp was a pornographer and the most brutal of all. He owned about three women or girls at any given time. Every night he’d run stag films after which he’d choose one of us for sex. The sex always duplicated the pornography. He used it to teach us to service him. He made pornography of all of us. He also made tape recordings of us having sex with him and of our screams and pleas when he beat us, often threatening us with death. Later he would use these recordings to humiliate us by playing them for his friends in our presence, for his own sexual arousal and to terrorize us or other women he brought home.”

¹¹³ *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556

Workplace discrimination and victimisation as a result of the display of pornography was also experienced by Ms B who testified at the Civil Rights Hearings:

“...I, for the past six years, have been in training to be a plumber...I got stuck on a job that was almost completed but not quite...When I got on the job...it was a real shock when I walked in, because three of the four walls in the room were completely decorated with pictures out of various magazines, Hustler, Playboy, Penthouse, Oui, all of those. Some of them I would have considered regular pinups, but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage...I put up with it for about a week...I felt totally naked in front of these men...I got pissed off one day and ripped all the pictures off the wall. Well, it turned out to be a real unpopular move to do. I came back in at lunch time and half the pictures were back up again...I began to eat my lunch at other places in the building and was totally boycotted at work. The men wouldn't talk to me. I was treated like I had just done something terrible.”¹¹⁴

In summary, there is significant documented evidence of the harms of pornography to women including sexual abuse in the home by family members and friends, rape and sexual abuse by strangers and workplace harassment and intimidation:

“The harms of pornography to women...include dehumanization, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment. Pornography also diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women's equal access to protected rights.”¹¹⁵

1 *The Problem of Causation*

“The relationship between particularly sexually violent images in the media and subsequent aggression...is much stronger statistically than the relationship between smoking and lung cancer.”¹¹⁶

¹¹⁴ Testimony of Ms B quoted in MacKinnon, Catharine A & Dworkin, Andrea *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 121-122

¹¹⁵ Factum of the Intervener Women's Legal Education and Action Fund in the case of *R v Butler*, File No. 22191, para 23

¹¹⁶ Donnerstein, Edward. (1983) *Unpublished transcript of testimony to the Public Hearings on Ordinances to Add Pornography as Discrimination against Women*, (Committee on Government Operations, City Council, Minneapolis), 4-12 quoted in Diana Russell Web Page, “Pornography as a Cause of Rape”, located at <http://www.dianarussell.com/pornasviolence.html> accessed at 20 December 2005. See also Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993) and Russell, Diana

Traditionally, the narratives of women, such as those discussed above, have been discredited by those who argue that the “pleasure to be gotten from” pornography outweighs the harm of it,¹¹⁷ or in fact, that there is no evidence that pornography causes harm at all. MacKinnon comments that it is frustrating that, “studies by men in laboratories to predict that viewing pornography makes men more sexually violent” are required before the voices of women harmed by pornography will be believed.¹¹⁸ Combined with the narratives of women harmed by pornography, it is difficult to ignore findings by researchers that there is a relationship between pornography and violence against women. And yet, far too many do.

It is not the purpose of this thesis to provide a detailed analysis of every study investigating the effects of exposure to pornography. The findings of these studies have been summarised by others.¹¹⁹ Einsiedel, for example, summarised the findings of researchers as follows:

E.H., “Nadine Strossen: The Pornography Industry’s Wet Dream”, *On the Issues*, Summer 1995, 32 at 33 in which this correlation is discussed.

¹¹⁷ MacKinnon, Catharine A., *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987), 202

¹¹⁸ Ibid

¹¹⁹ See for example Russell, Diana E H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993) and Einsiedel, Edna F., “The Experimental Research Evidence: Effects of Pornography on the “Average Individual” in Itzin, Catherine (ed) *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992). Kendall (at 7-8) summarises “the literally thousands of empirical studies on this subject” relied upon by the Women’s Legal Education and Action Fund (“LEAF”) in the Factum it filed as an Intervener in *R v Butler*. Kendall, quotes LEAF (at 7):

“LEAF, summarizing the groundbreaking work of experimental psychologists, noted that ‘when explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women is known to increase as a result of exposure.’”

“In evaluating the results for sexually violent material, it appears that exposure to such materials (1) leads to a greater acceptance of rape myths and violence against women; (2) has more pronounced effects when the victim is shown enjoying the use of force or violence; (3) is arousing for rapists and for some males in the general population; and (4) has resulted in sexual aggression against women in the laboratory.”¹²⁰

Kendall (fn 30 of Chapter 1) cites the following authorities relied upon by LEAF (at para 34) as evidence for this quotation:

“...E. Donnerstein, “Pornography: Its Effect on Violence against Women,” in N. Malamuth and E. Donnerstein, eds., *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 53; N. Malamuth and L. Berkowitz, “Victim Reaction in Aggressive Erotic Films as a Factor in Violence against Women” (1981) 41 *Journal of Personality and Social Psychology* 710; N. Malamuth and J.V.P Check, “The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment” (1981) *Journal of Research in Personality* 436; N Malamuth, “Factors Associated with Rape as Predictors of Laboratory Aggression against Women” (1983) 45 *Journal of Personality and Social Psychology* 432; N. Malamuth and J.V.P Check, “Aggressive Pornography and Beliefs in Rape Myths: Individual Differences” (1985) 19 *Journal of Research in Personality* 299; M. McManus, *Introduction to Report of Attorney General’s Commission on Pornography* (Nashville: Rutledge Hill Press, 1986), xviii; N. Malamuth and J.V.P. Check, “Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim’s Perceived Reactions” (1980) 10 *Journal of Applied Social Psychology* 528; and D. Linz and J. Bryant, “Effects of Massive Exposure to Pornography,” in N. Malamuth and E Donnerstein, eds., *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 115”

Kendall (at 7) also quotes LEAF (at para 45) in relation to research on non-violent materials, “Referring to non-violent materials – that is, those that degrade and dehumanize women – the evidence demonstrates clearly that these materials also increase self-reported sexually aggressive behaviour.” Kendall (fn 31 of chapter 1) cites the following authorities relied upon by LEAF as evidence for this quotation:

“J.V.P Check and T.H Guloien, “Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography and Erotica,” in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989); D. Zillman and J. Bryant, “Effects of Massive Exposure to Pornography,” in N. Malamuth and E. Donnerstein eds., *Pornography and Sexual Aggression* (New York; Academic Press, 1984), 115; J.V.P.Check and N. Malamuth, “Pornography and Sexual Aggression: A Social Learning Theory Analysis” (1986) 9 *Communication Yearbook* 181; D. Zillman and J.B. Weaver, “Pornography and Men’s Sexual Callousness Toward Women,” in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989), 45; D.E.H. Russell, “Pornography and Rape: A Causal Model” (1989) 9 *Political Psychology* 41; D. Zillman and J. Bryant, “Effects of Prolonged Consumption of Pornography on Family Values” (1988) *A Journal of Family Issues* 518; J.G. Buchman, “Effects of Nonviolent Adult Erotica on Sexual Child Abuse Attitudes” (paper presented at meeting of the American Psychological Association, Boston, August 1990).”

¹²⁰ Einsiedel, Edna F., “The Experimental Research Evidence: Effects of Pornography on the “Average Individual” in Itzin, Catherine (ed) *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992), 265-266

Russell also summarises the research on the causal relationship between pornography and harm as follows:

- “• A high percentage of non-incarcerated rapists and child molesters have said that they have been incited by pornography to commit crimes;
- Pre-selected normal healthy male students say they are more likely to rape a woman after just one exposure to violent pornography;
- A high percentage of male junior high school students, high school students, and adults in a non-laboratory survey report imitating X-rated movies within a few days of exposure;
- Hundreds of women have testified in public about how they have been victimised by pornography;
- Ten percent of a probability sample of 930 women in San Francisco and 25% of female subjects in an experiment on pornography in Canada reported having been upset by requests to enact pornography;
- Many prostitutes report that they have experienced pornography related sexual assault;
- The laws of social learning must surely apply to pornography at least as much as the mass media in general. Indeed, I – and others – have argued that sexual arousal and orgasm are likely to serve as unusually potent reinforcers of the messages conveyed by pornography;
- A large body of experimental research has shown that the viewing of violent pornography results in higher rates of aggression against women by male subjects.”¹²¹

As mentioned by Russell above, the messages in pornography are reinforced by sexual arousal and orgasm. Wyre also observes from his career in working with sex offenders that:

“Pornography is not just an image: it is an image that creates sexual arousal and orgasm. Through pornography men learn to become sexually aroused by fear, aggression, pain and violence. Those things are not inherently sexual, but

¹²¹ Russell, Diana E H., *Against Pornography: The Evidence of Harm* (Berkeley; Russell Publications, 1993), 149-150

pornography makes them sexual. Pornography is part of an active process whereby men use it to masturbate, for sexual arousal and orgasm, and in the process internalize the experience of sexual violence as erotic.”¹²²

We live in a society premised upon inequality of the sexes. Pornography is a central means of maintaining this inequality. Amongst other things, it presents women as enjoying being raped and rape as a legitimate form of male sexual expression. However, the fear of rape is another factor which perpetuates inequality. The possibility of rape and rape itself has been said to be the main factor in “the perpetuation of male domination over women by force.”¹²³ Women fear rape and, as Russell asserts, pornography sexualises it, hence normalising it.

Russell acknowledges that there are a number of factors that may dispose males to rape including biological factors, childhood sexual abuse, male sex-role socialisation, exposure to mass media that encourages rape and exposure to pornography.¹²⁴ Russell then limits her focus to exposure to pornography as a cause of rape and summarises her theory as follows:

“Pornography (1) predisposes some males to want to rape women and intensifies the predisposition in other males already so predisposed; (2) undermines some males’ internal inhibitions against acting out their desire to rape; and (3) undermines some males’ social inhibitions against acting out their desire to rape.”¹²⁵

¹²² Wyre, Ray, “Pornography and Sexual Violence: Working with Sex Offenders” in Itzin, Catherine (ed) *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992), 244-245

¹²³ Brownmiller, Susan, quoted in Eisenstein, Hester, *Contemporary Feminist Thought* (London: Allen & Unwin, 1984), 27

¹²⁴ Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 118

¹²⁵ Id, 119

I will now discuss Russell's "theoretical model of Pornography as a Cause of Rape"¹²⁶ in more detail here as I believe it provides a useful analysis of the connection between pornography and sexual violence against women and women's inequality generally.

(a) Russell's theoretical model of pornography as a cause of rape

(i) Factor I: Pornography predisposes some males to want to rape women and intensifies the predisposition in other males already so predisposed

Russell states that there are four different ways in which pornography can induce this predisposition. Firstly, pornography pairs sexually arousing stimuli with portrayals of rape. Russell notes that viewers of pornography can develop arousal responses to presentations of rape, murder, child sexual abuse and/or other abusive behaviour which they did not have before. The laws of social learning indicate that all it may take is the repeated pairing of rape with arousing portrayals of female nudity.¹²⁷ Even if males are not excited whilst viewing violent pornography, subsequent masturbation may reinforce this association.¹²⁸

Secondly, pornography increases men's self-generated rape fantasies. For example, a study by Neil Malamuth found that men who were exposed to pornography showing rape had

¹²⁶ Id, 120-121

¹²⁷ Id, 123

¹²⁸ Ibid

significantly more violent sexual fantasies after the viewing than a control group who were exposed to a mutually consenting version.¹²⁹

Thirdly, pornography sexualises dominance and submission. An experiment by Check and Guloien, compared the effects of subjects' exposure to sexually violent pornography, sexually explicit degrading pornography and sexually explicit non-degrading pornography.¹³⁰ The study found that those subjects who viewed both the sexually violent pornography and the sexually explicit degrading pornography reported that they would be more likely to engage in rape or other coercive sex acts than the control group. Russell cites this experiment as support for her claim that pornography sexualises dominance and submission.¹³¹

Finally, pornography creates an appetite for increasingly stronger material.¹³² In an experiment undertaken by Zillman and Bryant, subjects were given a "massive exposure" to pornography (36 non violent pornographic films for 6 sessions per week). This exposure resulted in the subjects having an increased desire to view stronger material.

¹²⁹ Malamuth, Neil, "Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli" (1981) 10 *Archives of Sexual Behavior*, 33-47 cited in Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 123-124

¹³⁰ Check, James, and Guloien, Ted "Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica", 159-184 cited in Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 129

¹³¹ Ibid

¹³² Zillmann, D. and Bryant, J, "Effects of Massive Exposure to Pornography" in Malamuth, N and Donnerstein D. (eds), *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 115-138 cited in Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 130

(ii) ***Factor II: Pornography undermines some men's internal inhibitions against acting out the desire to rape***

Russell identifies several ways in which pornography undermines some men's internal inhibitions against acting out the desire to rape. The first is that pornography objectifies women. By presenting women as objects to be used by men for sexual pleasure instead of human beings, pornography undermines some men's inhibitions against acting out their desire to rape.¹³³

Secondly, pornography perpetuates rape myths. Rape myths are misconceptions about rape such as that women enjoy being raped, that rape victims do not suffer harm from being raped, that when a woman says "no" she really means "yes", and the like.¹³⁴ By presenting women as enjoying rape, pain, torture and degradation, the inhibitions of some men to rape are undermined because these myths become believable.¹³⁵

Thirdly, pornography presents violence by men against women as acceptable behaviour. Russell states that males' inhibitions against acting out the desire to rape can also be undermined if they consider male violence against women as acceptable behaviour.¹³⁶ Russell states that studies of sexual violence where men were shown sexually violent films

¹³³ Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 131-2

¹³⁴ Id, 133

¹³⁵ Id, 132

¹³⁶ Id, 134

which portrayed sexual violence as having positive consequences increased the men's acceptance of violence against women.¹³⁷

Fourthly, pornography trivialises rape.¹³⁸ In a study by Zillmann and Bryant, men were given a "massive exposure" to non-violent pornography for 4 hours and 48 minutes per week for 6 weeks.¹³⁹ After the third week, the men were told they were participating in a study that required them to evaluate a rape trial. The study found that those subjects in the massive exposure category considered rape a less serious crime than they did before they were exposed to it. These men also thought that sentences for rape should be shorter, that sexual abuse caused less suffering for victims, including the case of an adult male having sexual intercourse with a 12 year old girl.¹⁴⁰

Fifthly, pornography enhances men's sexual callousness toward women.¹⁴¹ Russell comments that the above study by Zillmann and Bryant found that subjects in the massive exposure category had enhanced attitudes of sexual callousness toward women. Subjects were more accepting of statements such as, "A woman doesn't mean 'no' until she slaps you", and "if they are old enough to bleed, they are old enough to butcher."¹⁴² Russell

¹³⁷ Ibid

¹³⁸ Id, 135

¹³⁹ Zillmann, D. and Bryant, J, "Effects of Massive Exposure to Pornography" in Malamuth, N and Donnerstein D. (eds), *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 132 cited in Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 135

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² Id, 135

concludes that these statements also indicate a general hostility towards women which is difficult to distinguish from sexual callousness.

Sixthly, Russell states that pornography increases males' acceptance of male dominance in intimate behaviours.¹⁴³ Russell states that massive exposure to pornography also increased men's acceptance of male dominance in intimate relationships. Men were more likely to reject the notion that women are, or should be equal in intimate relationships and their support for the women's liberation movement declined significantly.¹⁴⁴

Finally, Russell states that pornography desensitises men to rape.¹⁴⁵ Russell gives the example of a study by Linz, Donnerstein and Penrod on desensitisation in which men were shown 10 hours of R-rated or X-rated movies for 5 days.¹⁴⁶ Russell reports that by the fifth day, the men rated the films as less graphic and less violent and significantly less degrading to women. Men also reported an increased willingness to see similar films again. The men were shown a film of a rape trial and those who had seen R-rated films and X-rated violent films rated the victim as more worthless, her injury as less severe and assigned greater blame on the victim for being raped.¹⁴⁷

¹⁴³ Id, 136

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Donnerstein, L. and Linz, D. *Presentation Paper to the Attorney General's Commission on Pornography*, Houston, TX cited in Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 137

¹⁴⁷ Ibid

(iii) ***Factor III: Pornography undermines some men's social inhibitions against acting out the desire to rape***

Russell highlights two reasons why pornography undermines some men's social inhibitions in acting out their desire to rape. Firstly, pornography diminishes the fear of social sanctions for rape by portraying rape as easy to get away with.¹⁴⁸ Secondly, Russell states that the fear of disapproval by peers is another social inhibition that may be undermined by pornography. Russell refers to research by Zillmann which found that subjects who were exposed to massive amounts of pornography were more likely to overestimate the number of people who engage in uncommon sexual practices such as anal intercourse, group sexual activities, sadomasochism and bestiality.¹⁴⁹

In summary, it is important to place Russell's theory of pornography as a cause of rape within the context of inequality. Pornography is not only one of the causes of rape, but also of sexual violence against women and children. Whilst pornography presents women as second class citizens who enjoy rape, rape and the fear of rape contributes to and helps maintain inequality. Rape must also be placed in the context of inequality generally. Rape happens because we live in a society premised upon inequality. Pornography both sexualises and causes this inequality.

Although Russell provides an excellent causal model which demonstrates how pornography can cause harm, the writer cannot help thinking that causation is a patriarchal construct

¹⁴⁸ Id, 138-139

¹⁴⁹ Id, 139

which is used to legitimise arguments in favour of pornography. As Cameron and Fraser have noted “any feminist who objects to pornography is immediately challenged to demonstrate such a causal relationship”.¹⁵⁰ Cameron and Fraser have argued that we need to move beyond simplistic notions of cause and effect. Instead, they argue that the connection between pornography and violence against women should not merely be examined in causal terms but rather, with a focus on cultural meanings in the light of which individuals produce both representations and actions:

“When someone looks or reads, they are constantly engaging, interacting from the text to produce meaning from it. The meaning is not magically, inherently ‘there’ in the pictures or the words: the reader has to make it. The text does not independently have effects on readers or compel them to act in particular ways, as if they were passive and unreflecting objects. They are subjects, creators of meaning; the pornographic scenario must always be mediated by their imagination.”¹⁵¹

What Cameron and Fraser are suggesting is that there is a connection between representations and sexual violence.¹⁵² They also recognise that there are some “copycat” incidences where consumers of pornography have copied what they have seen in pornography, as evidenced by the testimony of numerous witnesses at the civil rights hearings.¹⁵³ They argue, however, that instead of the relationship between pornography and violence being one of “cause and effect”, the relationship instead “turns on the construction of desire.”¹⁵⁴ For Cameron and Fraser, pornography constructs narratives of

¹⁵⁰ Cameron, Deborah & Frazer, Elizabeth, “On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect” in Itzin, Catherine (ed) *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992), 361

¹⁵¹ Id, 370-371

¹⁵² Id, 378

¹⁵³ Id, 362

¹⁵⁴ Id, 376

“male transcendence and mastery”¹⁵⁵ which “shape our culture’s sexual and social imagination”.¹⁵⁶ The reader or viewer is the “subject” and the person in the pornography is the “object” which the subject can control by imposing his will on the subject through acts of violence such as rape or murder.¹⁵⁷ Cameron and Fraser argue that:

“...we need to move beyond causal accounts of human actions, and look instead at the resources humans bring to their interpretations and representations, the meanings which shape their desires and constrain the stories they can imagine for themselves. For we are clearly not free to imagine just anything; we work both with and against the grain of the cultural meaning we inherit...In the sphere of sexuality, pornography is a significant source of ideas and narratives. It transmits to those who use it – primarily men but also women – notions of transcendence and mastery as intrinsic to sexual pleasure. These ideas are not just taken up by those who become rapists and killers. On the contrary, they pervade our every day, unremarkable sexual encounters as surely they do the grotesque acts of Ted Bundy and his ilk.”¹⁵⁸

Perhaps put more simply, Cameron and Fraser’s theory is that the patriarchal system in which we exist constructs sexuality in a context of “male transcendence and mastery” or in other words, male dominance. This construction of sexuality, based on inequality in which the male is the active subject and the female is the passive object, is central to our way of thinking. The way we construct sexuality, that is, on the basis of inequality, creates a social environment in which sex discrimination in the workplace through to rape and sexual murder flourish. It is within this context of inequality in which pornography exists and which is reflected in pornography.

¹⁵⁵ Id, 378

¹⁵⁶ Id, 379

¹⁵⁷ Id, 378

¹⁵⁸ Id, 381

In support of the broader approach to causation taken by Cameron and Fraser, Weaver also examined the research on the causal relationship between pornography and harm.¹⁵⁹ Weaver commented that it is probable that pornography contributes to misogynistic attitudes in non sexual circumstances such as employment discrimination and economic exploitation.¹⁶⁰ Weaver admits that although there is little empirical evidence on this issue, women are presented in pornography as sexually subordinate and inferior to men, in a way that is consistent with supporting sexist stereotypes which underlie discrimination against women. This is discussed in more detail below.

There is certainly merit in both Russell's analysis of pornography as one of the causes of rape and also in Cameron and Fraser's view that we need to move beyond causation. Whether it is a matter of direct causation, or the cultural meaning of inequality created by pornography, it is evident, especially from the narratives of those harmed by pornography, that pornography is harmful.

C. Pornographic Harm 3: Maintaining Systemic Gender Inequality and Sex Discrimination

Central to this thesis is MacKinnon and Dworkin's conviction that pornography should be regulated as an issue of sex discrimination, instead of censorship (morality). This thesis also argues that a version of MacKinnon and Dworkin's Civil Rights ordinance should be

¹⁵⁹ Weaver, James, "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography" in Itzin, Catherine (ed) *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992), 284

¹⁶⁰ Id, 307

enacted in Australia, preferably as an amendment to equal opportunity legislation, to regulate pornography distributed via the internet and pornography distributed in other ways. In order to understand why pornography should be regulated in this manner, it is necessary to outline MacKinnon and Dworkin's views on pornography.

MacKinnon and Dworkin argue that pornography is a principal means of maintaining inequality in society, by sexualising women's unequal position in society. Pornography constructs a gendered hierarchy between men and women with men at the top and women at the bottom.¹⁶¹ The hierarchy constructs men as dominant and women as inferior, with

¹⁶¹ When I refer to "male" and "female" and "men" and "women" I am not referring to biology. Rather, I am referring to the social construction of these terms. Kendall discusses this in Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 31:

"To talk of sex discrimination is to talk of gender and the inequalities that arise within a society in which gender differences are polarized and hierarchical – a society in which those who are 'male' get privilege and those who are not, do not. I refer here not to gender as biologically determined but rather gender differences as socially constructed and as defined by specific behaviours that ultimately result in the gender categories 'male' and 'female'. As MacKinnon explains '[g]ender is an inequality, a social and political concept, not a biological attribute, having nothing whatever to do with inherence, pre-existence, nature, essence, inevitability, or body as such.'" Kendall quoting MacKinnon, Catharine, A., *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 114

Kendall also cites Oostergaard to explain this social construction of gender:

"[g]ender refers to the qualitative and interdependent character of women's and men's position in society. Gender relations are constituted in terms of the relations of power and dominance that structure the life chances of women and men. Thus gender divisions are not fixed biology, but constitute an aspect of the wider social division of labour and this, in turn, is rooted in the conditions of production and reproduction and reinforced by the cultural, religious and ideological systems prevailing in a society.

The relations between men and women are socially constituted and not derived from biology. Therefore the term gender relations should distinguish such social relations between men and women from those characteristics which can be derived from biological differences.

These relations are not necessarily nor obviously harmonious and non-conflicting. On the contrary, the socially constructed relations between the genders may be ones of opposition and conflict. But since such conflicts are not to be analyzed as facts of biology and nature but as being socially determined, they may take very different forms under different circumstances. They often take the form of male dominance and female subordination.

In short, the concept of gender makes it possible to distinguish the biologically founded, sexual differences between women and men from the culturally determined differences between the roles given to or by women and men respectively in a given society. The first are unchangeable, like a

women shown to exist solely for the sexual pleasure of men. Men are active, women are passive. Men act upon, and use women for sexual pleasure. Women are shown to enjoy being used for male sexual pleasure. Women's perceived enjoyment of their objectification and humiliation, creates the belief in the viewer of pornography that this inequality is natural and normal. MacKinnon argues that it is this inequality that makes pornography sexy:

“Inequality between men and women is what is sexy about pornography – the more unequal the sexier. In other words, pornography makes sexuality into a key dynamic in gender inequality by viscerally defining gender through the experience of hierarchical sexuality. On the way, it exploits inequalities of race, class, age, religion, sexual identity and disability by sexualising them through gender.”¹⁶²

As has been illustrated in this chapter, violence and the absence of consent is a central experience of women used and forced to perform in pornography. Often, pornography shows men to have the power of sexual violence, which is then inflicted on women. Dworkin identifies the sexualisation of violence as part of the hierarchy that promotes inequality between men and women in society and which also promotes sexual abuse:

“The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women is what sex is taken to be...Pornography...crushes a whole class of people through violence and subjugation: and sex is the vehicle that does the crushing...Pornography, unlike obscenity, is a discrete, identifiable system of sexual exploitation that hurts women as a class by creating inequality and abuse.”¹⁶³

destiny. The latter are workable and may be changed by political and opinion-shaping influences.” Oostergaard, Lise, *Gender and Development: A Practical Guide* (London: Routledge, 1992), 6-7 quoted in Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), Chapter 2, fn 2

¹⁶² MacKinnon, Catharine, A., “Pornography as Defamation and Discrimination” (1991) 71 *B. U. L. Rev* 793, 802

¹⁶³ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” (1985) 8 *Harv. Women's L. J.* 1, 9

MacKinnon and Dworkin argue that through the use of gender, pornography sexualises inequality. Subordination of women in a sexual context is carried through to a social context. Through hierarchy, pornography tells lies about women and their place in society. The sexualisation of women's submission in pornography is then carried through to society's perceptions about women:

“Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalises the sexuality of male supremacy which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constructs the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.”¹⁶⁴

In the Canadian Supreme Court case of *R v Butler*, discussed in chapter 3, the Women's Legal Education and Action Fund, (“LEAF”), argued that pornography was an issue of sex discrimination which caused systemic gender inequality and the subordination of women within society.¹⁶⁵ LEAF reviewed all the pornographic materials seized from the defendant's pornographic book store. Adopting MacKinnon and Dworkin's equality-based approach, LEAF argued in their factum that, “pornography amounts to a practice of sex discrimination against individual women and women as a group”¹⁶⁶ and that the documented harms of pornography to women “include dehumanisation, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment. Pornography also diminishes the reputation of women as a group, deprives

¹⁶⁴ MacKinnon, Catharine A., *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 197

¹⁶⁵ Factum of the Intervener Women's Legal Education and Action Fund in the case of *R v Butler*, File No. 22191

¹⁶⁶ *Id.*, paragraph 7

women of their credibility and social and self worth, and undermines women's equal access to protected rights."¹⁶⁷ After viewing these materials, LEAF made the following submission about the way women are constructed in pornography:¹⁶⁸

"In these materials, inter alia, women are presented as being raped. Sometimes they act as if they are enjoying it; sometimes they scream, resist and try to run. Sex acts are presented as being performed on subordinates or superiors by caretakers, including employer on employee, priest on penitent, doctor on nurse or nurse on patient. Adult women are presented as children, with child-like (shaved) pubic areas, teddy bears, hair ribbons and saddle shoes. Some participants appear to be children. Women are shown having sex with women, as sex for men. An Asian woman is subjected to racist insults as part of forced fellatio and rape. Women are presented as being sexually insatiable. Women are simultaneously or serially penetrated in every orifice by penises or objects. Women are presented as gagging on penises down their throats. Women lick men's anuses. Women are bound with rings through their nipples, and hung handcuffed from the ceiling. Men ejaculate all over women, including on their faces and into their mouths. In these contexts, women are referred to and described as "pussy", "cunt", "split beavers", "hole", "bitch", "hot titties and twats", "dyke meat", and "chocolate box".

In summary, MacKinnon and Dworkin argue that pornography is central in maintaining the "social subordination"¹⁶⁹ of women; in other words, sexual inequality. Dworkin identifies four main parts to social subordination: hierarchy, objectification, submission and violence. An overview of these four main parts further illustrates MacKinnon's and Dworkin's argument that pornography operates to maintain women's inequality in society:

"Social subordination has four main parts. First, there is hierarchy, a group on top and a group on the bottom...Second, subordination is objectification. Objectification occurs when a human being, through social means, is made less than human, turned into a thing or commodity, bought and sold...Third, subordination is submission. A person is at the bottom of a hierarchy because of a condition of birth; a person on the bottom is dehumanized, an object or commodity; inevitably, the situation of that person requires obedience or compliance...Fourth, subordination is violence. The violence is systematic, endemic enough to be

¹⁶⁷ Id, paragraph 23

¹⁶⁸ Id, paragraph 4

¹⁶⁹ Dworkin, Andrea, "Against the Male Flood: Censorship, Pornography and Equality" (1985) 8 *Harv. Women's L.J* 1, 15.

unremarkable and normative usually taken as an implicit right of the one committing the violence.”¹⁷⁰

Due to MacKinnon and Dworkin’s identification of pornography as a means of maintaining systemic sex inequality, and the coercion and abuse of women used in pornography, MacKinnon and Dworkin assert that pornography should be regulated as an issue of sex discrimination, rather than through morality based censorship legislation (also known as obscenity):

“The law of obscenity has literally nothing in common with this feminist critique. Men’s obscenity is not women’s pornography. Obscenity is more concerned with whether men blush, pornography with whether women bleed – both producing a sexual rush.”¹⁷¹

This point will be examined in greater detail in chapter 3. For the time being, however, it is important to analyse the new reality of pornography on the internet. As will be seen in the next chapter, there is a prolific and increasing amount of violent, degrading and dehumanizing materials readily and easily available via the internet, a medium which transmits inequality into our homes and workplaces like never before.

¹⁷⁰ Id, 15-16

¹⁷¹ MacKinnon, Catharine A., *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 199

CHAPTER 2

PORNOGRAPHY ON THE INTERNET

I. INTRODUCTION

“Each new technology raises anew the question of the adequacy of legal approaches. Cyberspace makes vivid, if it was not already, the inefficacy of current obscenity law, which co-exists with this exploding market in human abuse, as it has with every other means of sexual trafficking. Just as the harms pornography does are no different on-line than anywhere else, the legal approach taken to them need be no different. Computer networks present a newly democratic, yet newly elite, mass form of pornography becoming less elite by the minute, just as pornography always has. In whatever form pornography exists, its harms remain as pornography always has. In whatever form pornography exists, its harms remain harms to the equality of women, so it is through addressing these harms that pornography can be confronted. Civil rights legislation designed to remedy pornography’s harms at their point of impact is well suited to this task.”¹

In order to illustrate why pornography is best regulated as an issue of sexual inequality, this chapter will examine the kinds of pornography available via the internet. This discussion is relevant to a critique of the regulation of internet pornography because the current internet censorship regime fails to recognise the extent and nature of pornography available via the internet, and more significantly, fails to address internet pornography as an issue of sex discrimination and inequality. An examination of the kinds of pornography available via the internet will show that presentations of sexual inequality are constantly used. In doing so I will show that, as MacKinnon has suggested above, pornography sexualises institutionalised gender hierarchies by eroticising dominance and submission.

¹ MacKinnon, Catharine A, “Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace” [1995] 83 *The Georgetown Law Journal*, 1959, 1966

The internet makes pornography readily available. The majority of Australians have internet access in their homes and businesses.² The internet allows pornography to be widely distributed and easily accessible, especially within the home. Consumers of pornography no longer have to attend adult bookstores, movie theatres or video stores to purchase or view it. Pornography can easily be accessed via the internet through subscribing to web sites or even free of charge.

This ease of access is of particular concern to women because the home is most often the source of sexual and other violence against women and children by their male relatives, friends or partners. As illustrated in the previous chapter, the majority of those who gave evidence at the Minneapolis and Indianapolis Hearings were raped and sexually abused by men they knew in the home such as their fathers, brothers, husbands and partners.

² The statistics currently available from the Australian Bureau of Statistics Web Page only provide statistics regarding home internet usage from 1996 to 2002. These statistics do, however, indicate that in each year internet access and usage, particularly in the home, is rapidly increasing. See for example Australian Bureau of Statistics, *Measuring Australia's Progress 2002: The supplementary commentaries communication and transport* (1370.0-2002) located at <http://www.abs.gov.au/Ausstats/abs@.nsf/0/5338D62935241FCDCA256BDC00122420Open> accessed at 19 December 2005 which states that "The number of households connected to the Internet grew rapidly between 1996 (when data was first collected) and 2000. In February 1996, about 260,000 households (fewer than 4%) had access to the Internet. By November 2000, this figure had risen to 2.7 million (37% of households)." Further, "In 2000, adults were more likely to access the Internet at home than in any other place." In addition, this report states, "By November 2000 some 4 million households owned a computer (56%) and more than two-thirds of these households were connected to the Internet. About 45% of households with access to the Internet used it daily, while a very high proportion (93%) accessed the internet at least once a week."

Australian Bureau of Statistics, *Measures of Australia's Progress: The measures of communication* (1370.0-2004) located at <http://www.abs.gov.au/Ausstats/abs@.nsf/0/12D74A6C075E8CC4CA256E7D00002651?Open> accessed at 19 December 2005 states that, "The number of households connected to the Internet grew rapidly between 1998 and 2002. In 1998, about 1.1 million households (16%) had access to the Internet. By 2002 this figure had risen to almost 3.5 million (46% of households)." This report further states that, "In 2002, the Internet was accessed daily in 37% of households with access to the Internet, with access at least once a week in 91% of such households."

Of further concern, is the fact that, at the time of the civil rights hearings, the internet was not widely available in homes and businesses. The growth of internet pornography invites and incites sexual abuse in the home, together with inequality in the public sphere. New technology has also made it easy for anyone with a digital camera to post “home made” pornography on the internet. As a result, pornography has moved even further into the private sphere. The internet not only makes pornography more readily available, it also allows more men to become pornographers with very little difficulty or expense. There is a proliferation of pornography on the internet labelled “amateurs”. Many of these amateur photographs are “home made” and raise serious concerns about the extent, if any, of consent given by the women photographed. Consequently, the internet allows sexual abuse in the home to extend to a new level:

“...the lines between pornography consumers and pornography producers are more blurred on the Internet and there is far greater room for the domestic or amateur production of pornographic materials. Individuals produce their own pornographic websites by uploading sexually explicit images of themselves and others, set up web cams to provide live internet footage of their daily sexual lives and routinely exchange their favourite images or video clips. While printed pornographic magazines do include sections devoted to “readers’ wives” and “amateurs”, the production and exchange described on the Internet is on a much greater scale.”³

Before examining the kind of pornography available via the internet, this chapter will commence by defining the “internet” and the “World Wide Web”. It will then examine the ways in which internet access can be restricted, for example, through the use of filtering software.

³ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 30

II. THE INTERNET AND THE WORLD WIDE WEB

The internet is a worldwide network of computers and computer programs which are connected via telephone networks.⁴ The internet does not come from a centralised source. Rather, it is a “network of networks”, which means that thousands of computer networks are connected to thousands of other computer networks in numerous countries.⁵ Hence, the internet is made up of thousands of “academic, government, military, corporate and public computer systems dotted around the globe, connected to – and communicating with – one another over thousands of kilometres of telephone wire, cables and satellite systems.”⁶ When a person using the internet (“user”) connects to the internet, they are said to be “online”.⁷ Although the network of computers that makes up the internet is comprised of thousands of different computers in different countries, the computers can communicate with one another because they share a universal method of communicating, called a “protocol.”⁸ A “protocol” is defined as “a standard or set of rules that computer network devices follow when transmitting and receiving data.”⁹

⁴ Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 4-5

⁵ Id, 4. See also Neely, Mark, *Australian Beginners Guide to the Internet* (Kiama: Maximedia Pty Ltd, 1997), 20

⁶ Neely, Mark, *Australian Beginners Guide to the Internet* (Kiama: Maximedia Pty Ltd, 1997), 20

⁷ Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 4

⁸ Ibid

⁹ Id, 4-5

No one owns, controls or regulates the internet.¹⁰ This means that, “no one person, group or country has the ability to censor or restrict access to the internet’s resources.”¹¹ Internet access is provided to homes and businesses through an Internet Service Provider (“ISP”).¹² Persons wanting access to the internet can subscribe to an ISP for a monthly fee and can then access the internet through the ISP’s network.

The internet is made up of several distinct parts, such as the World Wide Web, e-mail and newsgroups.”¹³ The World Wide Web can be described as a “subset of the internet”.¹⁴ Access to the internet allows a user to access and search for information on the “World Wide Web” which is also known as “the Web” or abbreviated as “www.”¹⁵ The World Wide Web is made up of “a vast collection of documents that combine text with pictures, sound, and even animation and video.”¹⁶ This vast collection of documents is comprised of “web pages” which are stored in “web sites.”¹⁷ “A Website is a location managed by an individual, group, organisation or company that provides information about specific areas

¹⁰ Id, 5. See also Neely, Mark, *Australian Beginners Guide to the Internet* (Kiama: Maximedia Pty Ltd, 1997), 22

¹¹ Neely, Mark, *Australian Beginners Guide to the Internet* (Kiama: Maximedia Pty Ltd, 1997), 22

¹² Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 25

¹³ Cowpertwait, John & Flynn, Simon, *The Internet from A to Z* (United Kingdom: Icon Books UK, 2000), 43

¹⁴ Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 6

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Id, 6-7

of interest, products, services, general knowledge and so on.”¹⁸ Thus, a University will have a web site which contains a variety of information about the University and its courses, or a retailer may have a web site to facilitate the purchase items sold by the retailer from the web page.

A user must use a “web browser” software program to access and view web sites such as “Microsoft Internet Explorer” or “Netscape Navigator.”¹⁹ The user can then search the web for specific information using a “search tool” such as “Google” which searches for web sites containing specific words or phrases or “Yahoo!” whereby information can be searched by category.²⁰

It is relatively easy for a person to set up their own website. One only needs to prepare the text and graphics that will form the web site on one’s home computer, then upload them to a “host server.”²¹ A host server “will take the form of a computer that is permanently connected to the Web” and in fact, many ISP’s will assist a person to construct and upload a site and may provide free space for the web site on the World Wide Web for those registered with them.²² Having a Web Site allows a person to communicate to thousands of

¹⁸ Cowpertwait, John & Flynn, Simon, *The Internet from A to Z* (United Kingdom: Icon Books UK, 2000), 44

¹⁹ Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 8

²⁰ Ibid

²¹ Id, 50

²² Ibid

people without the costs and logistical issues involved with printing, mailing and distribution.²³

A. *Restricting access to the internet*

There have been a number of software programs developed for homes and businesses to restrict internet access to certain materials. In the home, these programs are usually utilised by parents to restrict their children's access to pornographic material via the internet. The same applies to businesses with employers utilising this software to stop such materials being accessed in the workplace by employees.

The first way that access to the internet can be restricted is by a user (such as a parent) adjusting their web browser so that the web browser filters out certain subjects.²⁴ This filtering system is available via the web browsers "Microsoft Internet Explorer" or "Netscape Navigator" mentioned above. This is a password based system whereby the user can set filter ratings to set the level of materials that can be accessed in the areas of "Language, nudity, sex and violence"²⁵ on a sliding scale of 0-4.²⁶ The filter ratings can be

²³ Cowpertwait, John & Flynn, Simon, *The Internet from A to Z* (United Kingdom: Icon Books UK, 2000), 49. Note that although this thesis focuses on the internet and the World Wide Web, there are a number of other ways that information can be communicated via the internet. These include: electronic mail ("e-mail") whereby users can "send messages and files over a local computer network or the internet": Shelley, Gary B, Cashman, Thomas J, et al, *Discovering the Internet: Brief Concepts and Techniques* (Massachusetts: Thomson Course Technology, 2004), 9-10; via an e-mail program such as "Microsoft Outlook" or "Outlook Express."; *ibid.* Another is "Usenet" (also known as "newsgroups") where users can post messages to an electronic bulletin board: (*Id*, 10)

²⁴ Cowpertwait, John & Flynn, Simon, *The Internet from A to Z* (United Kingdom: Icon Books UK, 2000), 66

²⁵ *Id*, 67-68

²⁶ *Ibid*

set by selecting “tools”, “internet options”, “content” then “enable”. This creates a box named, “content adviser” in which the four categories of Language, nudity, sex and violence appear.²⁷ As an example, the ratings for “sex” are: for Level 0, “No sexual activity portrayed: Romance”; Level 1, “Passionate kissing”; Level 2, “Clothed sexual touching”; Level 3, “Non-explicit sexual touching”; and Level 4, “Explicit Sexual Activity”. The problem with this rating system is that the ratings can be easily altered by a user. One only has to adjust the ratings on the content advisor to be able to view a higher (and therefore more explicit) rating of material. So if a parent had set a Level 0 rating for one of the above categories of language, nudity, sex and violence, a computer proficient child could easily adjust the rating to Level 4. The rating system is also a system of self-regulation which relies on internet content providers voluntarily having their sites rated. As at 2000, more than 130,000 websites had been rated, including the top 100 web sites which account for 80% of all Web traffic²⁸. However, this would obviously not include many thousands of pornographic web sites available via the World Wide Web.

There are also many software programs that can filter or block certain internet content such as “CyberPatrol”, “CyberSitter”, “Net Nanny”, “Safesurf” and “Surf Watch.”²⁹ There are three main ways in which such filters can work. The first is through using “black lists” which contain names of offensive sites which are then blocked from being viewed. The second is through the use of “white lists” which list “non-offensive” sites that can be

²⁷ Id, 67

²⁸ Id, 68-69

²⁹ Id, 70

accessed but block all other sites. The third is “Content based filters” which look for offensive keywords and flesh coloured photos.³⁰ These software programs are meant to restrict access to a much broader area than through the Web Browser as described above.³¹ These programs can monitor keywords and stop the user from searching or downloading certain material from the internet such as material containing swearwords, picture, video or audio files, as well as preventing the user from accessing certain well known web sites, such as the “Playboy” Web Site.³² For example, the features of “Net Nanny” include: recording every web site, chat room and news group visited; preventing the giving out of personal information such as address, phone number and credit card information; a content filter to remove objectionable words and phrases; to block or control access to newsgroups.³³ There are some problems with filters such as “Net Nanny” such as sometimes allowing “offensive” content through and on the other hand, sometimes prohibiting access to non-offensive material.³⁴

These ways of restricting access to the internet may have limited success in restricting children’s access to internet pornography, and other material deemed unsuitable for children to view. However, these methods of restricting access make it the responsibility of

³⁰ Australian Government NetAlert Limited, <http://www.netalert.net.au/00932-How-do-Filters-Work.asp>, accessed at 31 December 2004

³¹ Cowpertwait, John & Flynn, Simon, *The Internet from A to Z* (United Kingdom: Icon Books UK, 2000), 69

³² Neely, Mark, *Australian Beginners Guide to the Internet* (Kiama: Maximedia Pty Ltd, 1997), 125

³³ The “Net Nanny” web page is located at, <http://www.netnanny.com/>, accessed 31 December 2004

³⁴ The Australian Government NetAlert Limited Web Page is located at <http://www.netalert.net.au/00934-Are-there-any-limitations-to-Filters.asp>, accessed 31 December 2004

the user, such as a parent, to restrict access. It will often be the user, such as the parent, who is also the abuser or even the pornographer.

B. *The kinds of pornography available via the internet*

1 *The Carnegie Mellon Report*

The Carnegie Mellon Report, conducted in 1995, was the first significant study to address the nature and extent of pornography on the internet.³⁵ The Report found that it was difficult to ascertain the exact percentage of pornographic images on the internet.³⁶ However, the Report focused on downloading “all available images” from five Usenet Newsgroups: “alt.binaries.pictures.erotica; alt.binaries.pictures.bestiality; alt.sex.fetish.watersports; alt.binaries.pictures.female; and alt.binaries.pictures.tasteless” over a four month period.³⁷ The Report found that the percentage of pornographic material posted on the Usenet was 83.5% of the total number of posts.³⁸

Johnson summarised the findings of the Report as follows:

“Among the study’s findings were that 83.5 per cent of the images stored on the Usenet newsgroups are pornographic, that a third of newsgroups most visited by college students are sexually explicit, that the 5 largest bulletin board systems have revenues over one million dollars per year, that their customers are nation and world –wide, that pornography is readily available to minors, and that the

³⁵ Rimm, Marty, “Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories” [1995] 83 *The Georgetown Law Journal* 1849 (“the Carnegie Mellon Report”)

³⁶ Id, 1868

³⁷ Id, 1853 and 1867

³⁸ Id, 1867

predominant images on computer nets are paedophilic, hebephilic, and paraphilic, including bondage, sadomasochism, urination, defecation and bestiality.”³⁹

Furthermore, the Report found that the most frequently downloaded pornographic material was that which was described as involving a power imbalance of men over women. It found, “at least some correlation between increased power imbalance between the sexes (man over woman) and increased consumption.”⁴⁰ For example, when the word “choke” was used in conjunction with fellatio, the number of downloads doubled.⁴¹ The Report also stated of the bestiality images downloaded that there was a disproportionate amount of women subjected to bestiality: “99.1% of the images depicted women engaged in sexual acts with animals, whereas only 0.9% depicted men engaged in sex acts with animals.”⁴² The Report also found a disproportionate amount of pornography in which women were humiliated or degraded. The Report notes, “the disproportion of imagery depicting women engaged in acts that would be considered degrading in most communities can be definitely established.”⁴³

³⁹ Johnson, Peter, ‘Pornography Drives Technology: Why Not to Censor the Internet’ (1996) 49 *Fed. Comm. L.J* 217, 224-225

⁴⁰ Rimm, Marty, “Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories” [1995] 83 *The Georgetown Law Journal*, 1898 – 1899; MacKinnon, Catharine A, “Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace” [1995] 83 *The Georgetown Law Journal*, 1959, 1963

⁴¹ Rimm, Marty, “Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories” [1995] 83 *The Georgetown Law Journal*, 1899

⁴² *Id.*, 1901

⁴³ *Id.*, 1899

The Report also identified at least 5 factors which have contributed to the rapid expansion of pornography distributed via the internet.⁴⁴ These factors were: firstly, the internet allows pornography to be consumed in private so consumers can avoid the embarrassment of going to an adult book store to buy pornography. Secondly, consumers could selectively download the specific pornography they wanted instead of buying an entire magazine or video. Thirdly, pornography can be discretely stored on a computer, making it easy to conceal from others. Fourthly, the fear of AIDS has allowed pornographers to market pornography as a safe alternative to 'real' sex. Finally, computer technologies are emerging and expanding in such a way as to be available to an expanding audience of consumers. That is, the internet is widely available in the home.

Although the Report was published in 1995 the above factors do provide a summary as to why pornography has proliferated on the internet as a flexible, discrete and readily available resource. These factors also draw attention to the fact that pornography is more readily available in the private realm of the home, thereby exposing women and children to the further risk of sexual violence and abuse, while also distributing inequalities message on a scale never seen before.

2 *Critique of the Carnegie Mellon Report*

The Report and its author have been criticised on many grounds. Johnson states that the study equated findings from adults' only bulletin boards which required credit cards and

⁴⁴ Id, 1852

proof of age with those from public networks which do not.⁴⁵ The Report was also criticised for not reporting that pornography only accounted for half of one percent of internet images and that it did not count actual down loads but opportunities to down load.⁴⁶ Rimm himself has also been criticised for being an undergraduate student when the research was undertaken and for methodological flaws in his research.⁴⁷

In this writer's opinion, despite any methodological flaws, the Report simply confirms what common sense already tells us (or what a simple search of the internet tells us): that a large amount of internet content is pornographic (as defined by MacKinnon and Dworkin), much of it is violent and dehumanising to women and that it is easily and frequently accessible and downloaded. Such a conclusion can be easily confirmed by a basic "Google" search which will reveal thousands of pornographic web sites at a time. The proliferation of internet pornography and its violent and dehumanising nature is further confirmed by the recent reports on youth access to internet pornography by Flood and Hamilton of The Australia Institute.⁴⁸

⁴⁵ Johnson, Peter, 'Pornography Drives Technology: Why Not to Censor the Internet' (1996) 49 *Fed. Comm. L.J* 217, 225

⁴⁶ Ibid

⁴⁷ Sutter, Gavin, "'Nothing New Under the Sun': Old Fears and New Media", (2000) 8 *IJL&IT* 338. Sutter (in section 2.1) details some of Rimm's methodological flaws including that Rimm's Report was not published in a peer refereed journal. The most significant methodological flaw outlined by Sutter is that the results were taken from a study of adult subscriber only bulletin boards and not the internet as a whole, whereas the results were represented as being applicable to the internet as a whole. See also Faucette, Jeffrey E, "Note: The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet" (1995) 44 *Duke L.J* 1155 for a discussion of how Rimm's Report instigated Carnegie Mellon University to ban access to certain newsgroups which contained "sexually explicit images".

⁴⁸ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003). See also Flood, Michael and Hamilton, Clive, *Regulating Youth Access to Pornography*, Discussion Paper 53 (Canberra: The Australia Institute, 2003)

3 *The Australia Institute Reports*

In February and March 2003, Flood and Hamilton from The Australia Institute published two reports on youth access to internet pornography. The first report, Discussion Paper Number 52, (“the first AI Report”) is titled, “Youth and pornography in Australia: evidence on the extent of exposure and likely effects”. This report surveyed 16 and 17 year old youths to examine the extent of their exposure to X-rated videos and internet pornography. Younger children were not examined for ethical reasons.⁴⁹ In doing so, the first AI Report identified the kinds of pornography available via the internet and the harmful effects of exposure to pornography on children.

The second report by Flood and Hamilton, Discussion Paper Number 53, (“the second AI Report”) is titled, “Regulating Youth Access to Pornography”. This AI Report states that it is intended to be read in conjunction with the first AI Report.⁵⁰ It found that there is a need to regulate children’s access to internet pornography because children are exposed to internet pornography through accidental or deliberate exposure.⁵¹ The second AI Report finds that the current system of regulation, under which the Australian Broadcasting Authority can issue a take down notice, is inadequate to protect children from exposure to internet pornography. Instead, it suggests a “schools-based educational program” and

⁴⁹ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), v

⁵⁰ Flood, Michael and Hamilton, Clive, *Regulating Youth Access to Pornography*, Discussion Paper 53 (Canberra: The Australia Institute, 2003), iv

⁵¹ Id, v

suggests that all ISP's should be required to filter internet content with the "end-user" being given the option of requesting that their computer not be filtered.⁵² To supplement the education and compulsory filtering, the second AI Report also suggests three other measures which are "age verification technologies", "plain brown wrappers for pornographic web sites" and "instant help functions for children exposed to offensive material."⁵³

4 *The findings of the first AI Report on exposure to internet pornography and how it is available*

In its discussion of how young people are exposed to internet pornography, the first AI Report notes that young people can be exposed both deliberately or accidentally.⁵⁴ This analysis applies to the ways people are exposed generally and not just young people. Obviously one way people are exposed to pornography is when they deliberately search for pornography on the internet. This is not difficult due to the large quantity of pornographic web sites available.⁵⁵ The first AI Report gives the example that if the words "sex pictures" are typed into the "Google" search engine, the search result is a list of three million web sites in 0.05 seconds.⁵⁶ Once these sites are accessed, the viewer has access to free pornography, even on commercial websites where such free pornography acts as a "teaser"

⁵² Id, vi

⁵³ Id, vii

⁵⁴ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 6

⁵⁵ Id, 7

⁵⁶ Ibid

to entice viewers to pay via credit card for further pornography.⁵⁷ Consumers of pornography can also arrange for free pornography to be e-mailed to them and many web sites contain free links to other web sites, making navigation of pornographic web sites easy.⁵⁸

Exposure to pornography can also occur through what the first AI Report names “accidental or inadvertent means”.⁵⁹ “Pop-ups”, are frequently used by internet pornographers as advertising for other pornographic web sites. The first AI Report gives the example of what a person will experience whilst viewing certain pornographic web sites:

“An individual viewing ‘softcore’ pornographic web sites will find that they are frequently subject to ‘pop-ups’, windows that appear unsolicited on their computer screen, advertising and offering links to other pornographic websites or inviting them to download content from other sites. Internet pornography is indiscriminate in the sense that the advertising in pornographic pop-ups is typically ‘hardcore’, regardless of what kind of material the computer user has been viewing...’ Pop-ups appear uninvited: multiple windows appear in quick succession, more opening as the viewer closes them, and it can be difficult to shut these windows and avoid going to the site being promoted unless one turns off the computer or the Internet link all together.”⁶⁰

The terms “softcore” and “hardcore” are referred to in the above quotation. “Softcore” is defined in the first AI Report as, “pictures of female (or male) nudity or semi-nudity (but not photos of labia or erect penises).”⁶¹ “Hardcore” is defined as, “pictures of sexual

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Id, 6

⁶⁰ Id, 9

⁶¹ Id, 26

activity in which a sexual act (such as vaginal intercourse, anal intercourse or oral sex) is explicitly depicted, and erect penises, ejaculation and female labia are visible.”⁶² It is interesting to note that these definitions are based on the degree of nudity or sexual activity shown. This adopts the censorship/ morality approach discussed in chapter 1 and later in chapter 3. In addition, these definitions do not appreciate the degree of harm to those women used to make pornography, which is likely to be exacerbated with “hardcore” pornography. Defining pornography in terms of the level of nudity or sexual activity, defines pornography with reference to women’s bodies. Note the majority of pornography is made of women, as indicated in Table 6 below. The more women’s bodies are shown the more hardcore or obscene the pornography is classified as.

Entering a pornographic web site can also result in a “Trojan horse” being installed in the viewer’s computer. Trojan horses are best known for deleting files and destroying information on a computer, but can also change the users desktop.⁶³ For example, the users “favourites” menu, in which the user can bookmark sites for ease of access, can be altered by a Trojan horse to include pornographic web sites as “favourites”.

Another technique employed by internet pornographers that is identified by the first AI Report is “traffic-forwarding” or “mouse trapping”.⁶⁴ This is where the viewer is

⁶² Ibid

⁶³ “The Difference Between a Virus, Worm and Trojan Horse?” located at <http://www.webopedia.com/DidYouKnow/Internet/2004/virus.asp> accessed at 11 July 2005

⁶⁴ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 9

automatically forwarded to another pornographic site. Pornographers can also use technology to hinder the user from leaving them.⁶⁵ Technology can also be utilised to alter the viewer's starting page on the Internet. For example, one of the authors of the first AI Report found that his internet starting page was altered from the Australian National University home page to "teenslut.com".⁶⁶

Pornographers also advertise through the use of "spam e-mails" which are unsolicited e-mails containing pornography and links to pornographic web sites.⁶⁷ Consequently, any person with an e-mail account may be exposed to unsolicited pornography.⁶⁸

From a harms based equality perspective, the technological techniques employed by internet pornographers to impose unsolicited pornography on users of the Internet are of great concern. They bring pornography into our homes and businesses with a frequency and availability that was unheard of at the time of the ordinance hearings. Such drives in technology make pornography more acceptable because it becomes an everyday part of our lives, in the home and in the workplace. This, in turn, allows pornography's message (that women are unequal citizens who enjoy rape and violence and who exist to be used for male sexual pleasure) to be very widely distributed and accepted.

⁶⁵ Ibid

⁶⁶ Id, 9-10

⁶⁷ Id, 9

⁶⁸ Note: the *Spam Act 2003* (Cth) has recently been enacted but arguably will have little effect on reducing internet spam pornography.

5 *The findings of the first AI Report on the kind of pornography available via the internet*

The first AI Report provides a detailed description of the availability and type of pornographic material on the internet. These include those that would appear on the shelves of adult book stores, and those that would not due to Australia's current censorship regime such as pornography involving bestiality, rape, torture and material taken without the knowledge of the woman photographed such as "upskirts" or "peeping Tom" photographs.⁶⁹ I will analyse this pornography, as others such as Russell and Dworkin have done previously.⁷⁰

Reproduced below is Table 6 of the first AI Report, which shows the type of pornography available via the internet.⁷¹ Although Table 6 is extensive, the first AI Report states that, "the list was generated after four hours of Internet 'surfing' among pornographic sites and is not exhaustive".⁷² If such a detailed list can be compiled after only four hours, it suggests a huge proliferation of internet pornography. Note that the majority of content categories are of pornography in which women are used:

⁶⁹ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), ix

⁷⁰ See Dworkin, Andrea, *Pornography: Men Possessing Women* (New York: Plume, 1989); Russell, Diana, EG, *Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993); Russell, Diana E.H., *Dangerous Relationships: Pornography, Misogyny, and Rape* (California: Sage Publications, 1998)

⁷¹ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 27-29

⁷² Id, 27

Table 6 A sample of types of Internet pornography

Content categories	Forms of content listed
General groupings	Hardcore Softcore Heterosexual ('Straight') Gay (gay male) ⁷³ Bisexual
Particular sexual practices	Fellatio ('Blowjobs') Anal intercourse Oral sex ('Oral') Male ejaculation ('Cum shots') Sex involving multiple participants ('Group Sex', 'Gang bangs', 'Threesome', 'Orgy') 'MMF' (two men and one woman) 'FFM' (two women and one man) Cunnilingus ('Muff dives') Masturbation Sex toys and dildos ('Toys', 'Strap on', 'Dildo', 'Vibrator') Female ejaculation 'Spanking' 'Tit Fucking' Sexual activity involving urination ('Golden Showers', 'Water Sports', 'Pee', 'Pissing') Coprophilia or sexual activity involving faeces ('Scat') 'Fisting', 'Finger/Fist' Bondage and sadomasochism ('SM', 'Sado maso', 'Femdom', 'Fem domination', 'Male domination') Bondage and discipline ('Bdsm', 'Domination') 'Leather' Bestiality ('Zoo Fetish') 'Smothering' 'Incest' 'Rape'
Particular body parts or bodily features	Breasts ('Tits') Big breasts ('Busty') Small breasts ('Small Tits') Buttocks ('Butts', 'Ass') Vulvas ('Pussy', 'Pussy Hole') Nipples ('Erect', 'Puffy', 'Abnormal', 'Oversized', 'Fetish', 'Bizarre') Shaved vulvas ('shaved') 'Legs and feet'

⁷³ See Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 65 for a discussion of the types of gay male pornography available via the internet.

	<p>Hairy vulva ('Hairy Pussy')</p> <p>'Huge cocks' (in heterosexual sex)</p> <p>'Tattoo'</p> <p>Piercing, body modification</p> <p>Amputees, women in casts and braces</p> <p>Menstruation</p>
Particular categories of women	<p>Young women ('Teen', 'Lolita', 'Schoolgirl', and further sub-categories)</p> <p>'Babes'</p> <p>'Blondes', 'Brunettes', 'Redheads'</p> <p>Transsexual ('Shemale', e.g. with both breasts and penis)</p> <p>Older women ('Mature', 'Grannies')</p> <p>'Drunk girl'</p> <p>'Cheerleaders'</p> <p>'Lesbian'</p>
Ethnic categories of women pictured or of participants	<p>'Asian'</p> <p>'Latina'</p> <p>'Ethnic'</p> <p>'Black', 'Ebony'</p> <p>'Japanese'</p> <p>'Indian'</p> <p>'Interracial', 'BBW' (two black and one white participant)</p>
Items of female clothing and underwear	<p>Bikini</p> <p>Lingerie</p> <p>Thongs and g-strings</p> <p>Bras</p> <p>Underpants ('Panties')</p> <p>Stockings, Pantyhose</p> <p>Latex</p> <p>Leather</p> <p>Uniforms</p>
Professional/ occupational status of women pictured	<p>Celebrities ('Celebrity Nudes')</p> <p>'Models'</p> <p>'Softcore' and 'Centrefold'</p> <p>'Babes'</p> <p>'Pornstars'</p> <p>Strippers and prostitutes ('Whores', 'Hookers')</p> <p>'Amateurs'</p>
Women of particular body shapes (outside pornographic norms)	<p>'Fat', 'Chubby Chicks'</p> <p>'Anorexic', 'Skinny', 'Petite'</p> <p>'Petite & Midgets'</p> <p>Amputees</p>
How and where the image was taken	<p>Voyeurism ('Voyeur', 'Upskirts', 'Spy')</p> <p>'Exhibitionist', 'Nudists', 'Flashing', 'Public'</p> <p>'Drunk', 'Bathing'</p> <p>Location (shower, bath, pool, office, outdoor, beach,</p>

	dressing room)
General groupings of fetishistic or non mainstream sexual practices	'Fetish' 'Bizarre' 'Xtreme'
Characteristics of the men pictured with women	Older men
Men (gay male pornography)	'Hunks' 'Bears' (larger, older, hairier men)
Type of image or electronic medium	Video clip/ Movie Web cams 'Close Ups' (of genitals) Cartoons Anime and Hentai (Japanese-style pornographic cartoons) 'Vintage' (older pornography)
Other categories	'Teacher', 'Nurse', 'Secretary', 'Maid', 'Housewife'

6 *Commentary on Table 6*

As the first AI Report notes in relation to Table 6, most internet pornography is centred on women's bodies, "either how they look or what can be done to and by them".⁷⁴ This is evident from content categories such as "particular body parts or bodily features", "particular categories of women", "professional/ occupational status of the women pictured" and so on. On the internet we see a prevalence of pornography being made of women for men. Women are not human beings but are reduced to body parts or bodily characteristics. Women are shown in stereotypical roles such as "Models", "Pornstars", "Whores" and "Hookers".

In addition to women being objectified and stereotyped, there is a prevalence of "sexually violent content in pornography" which is "non-consenting by definition".⁷⁵ The first AI

⁷⁴ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 29

⁷⁵ Id, 30

Report notes Barron and Kimmel's study of 37 magazines, 50 videos and all stories in excess of 250 words posted in one month from internet newsgroup "alt.sex.stories".⁷⁶ Barron and Kimmel's study found that Usenet pornography contained "significantly more violence" than videos or magazines and were also more likely to "show coercive rather than consensual sex, and dominant and submissive participants with men in the dominant position and women as the victims."⁷⁷

Flood and Hamilton also cite the research of Harmon & Boeringer who analysed 200 postings to "alt.sex.stories" over a two week period.⁷⁸ They found that "40.8 per cent of stories had themes of non-consent (including rape and child molestation), while 24 per cent had themes of bondage and discipline and 19.4 per cent concerned pedophilic sex."⁷⁹

Finally, Flood and Hamilton also cite a study of pornography on Internet newsgroups by Bjornebekk and Evjen who found "a wide range of forms of violent pornography (where

⁷⁶ Barron, M and Kimmel, M, "Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation" (2000) 37(2) *Journal of Sex Research*, 161-168 cited in Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 31

⁷⁷ Ibid

⁷⁸ Harmon, D. and Boeringer, S. B., "A Content Analysis of Internet-Accessible Written Pornographic Depictions" (1997) 3(1) *Electronic Journal of Sociology* <http://www.sociology.org/content/vol003.001/boeringer.html> cited in Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 31

⁷⁹ Ibid

acts of force and physical harm are depicted in explicit sexual contexts)”⁸⁰ on Usenet newsgroups:

“They include photographs of abuse of genitalia (such as the extreme widening of genitalia using bottles and tongs or the use of clips, clamps and hooks), females tied up and gagged and subjected to physical torture, people wrapped up in plastic or being strangled, child pornography, bestiality, defecation and urination and other violent acts in the sexual setting of the newsgroups (such as murder, dismemberment of bodies and mutilated and dead infants and embryos).”⁸¹

This chapter will now outline and examine, from a sex equality perspective, several types of internet pornography which are by definition violent and which also involve a lack of consent. These internet sites sexualise bestiality, rape and “Upskirts / Peeping Tom” fetish. All are readily available via the internet. The final category of pornography that will be examined is child pornography, which is more difficult to produce and download without criminal prosecution. This sex equality analysis will show that this pornography is premised upon inequality in which men are sexualised as dominant and powerful and women and children as submissive objects who enjoy pain, rape and humiliation at the hands of men, for men’s sexual gratification.⁸²

⁸⁰ Bjornebekk, R. and Evjen, T.A. “Violent Pornography on the Internet: A study of Accessibility and Prevalence” in von Feilitzen, Cecilia, and Ulla Carlsson (eds) *Children in the New Media Landscape: Games, Pornography, Perceptions* (Sweden: UNESCO International Clearing House on Children and Violence on the Screen, 2001), 185-206 quoted in Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 31-32

⁸¹ Id, 32

⁸² This kind of analysis has previously been done by Dworkin and Russell. See above Dworkin and Russell at note 68. See also MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989), 197 who argues that pornography uses sexual hierarchies to promote systemic gender inequality:

“Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women

7 *Bestiality*

The first AI Report identifies that there are voluminous numbers of bestiality sites, which show sexual activity between women and animals. These sites “offer free photographs and movies of women (and occasionally men) engaged in masturbation, oral sex or intercourse with dogs, horses, snakes and other animals.”⁸³ The first AI Report comments that bestiality is non-consenting because other species cannot consent to have sex with humans.⁸⁴ Whilst such a statement is nonsensical in itself, in the next sentence, the Report mentions the more obvious harm of such pornography in that, “participation by women in such activity is likely to have been coerced and is degrading”.⁸⁵ Applying an equality based analysis, making a woman engage in sexual activity with an animal in front of a camera is certainly an incredibly degrading, often painful, and dangerous experience for the woman.⁸⁶ It reduces the women to the status of an animal. It perpetuates myths about women, such as the myth that women are so eager to satisfy men sexually that they are willing to have sex with animals. In other words, such pornography promotes women as

as being. Pornography constructs who that is. Men’s power over women means that the way men see women defines who women can be. Pornography is that way.”

⁸³ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 33

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ See Lovelace, Linda, *Ordeal* (New Jersey: Citadel Press, 1980), 110 – 114 where Linda describes how she was forced to make a film in which she was penetrated by a dog. Linda described the pain and degradation she felt (at 114):

“Now I felt totally defeated. There were no greater humiliations left for me. The memory of that day and that dog does not fade the way other memories do. The overwhelming sadness that I felt on that day is with me at this moment, stronger than ever. It was a bad day, such a bad day.”

sexually voracious, unequal citizens who are willing to be penetrated by anything (man, object or animal).⁸⁷

8 Rape

The first AI Report also discusses “rape-focused web sites”.⁸⁸ It cites the research of Gossett and Byrne who analysed 31 of these web sites.⁸⁹ The first AI Report states that many of these sites boast that they are “real”.⁹⁰ Gossett and Byrne found that of the 113 images on these sites, the following kinds of images were available free of charge:

“...the victims are usually tied with rope or other restraints, a weapon is shown as being used, and typically the victim’s face is depicted as screaming or expressing pain. Half the rape sites describe the victims as young, using such terms as ‘young’, ‘teen’, ‘schoolgirl’, and ‘lolita’. Accompanying text accentuates the violent nature of the images depicted or available for a fee, using such language as ‘rape’, ‘torture’, ‘abuse’, ‘brutal’ and ‘pain.’”⁹¹

The above quotation refers to web sites in which rape is coupled with very young women being used as the victims. This shows a double hierarchy at work. Firstly, there is rape in which a man sexually assaults a woman without her consent. In rape pornography, women are objectified. Women are passive, less than human objects which the male can take and use as he wants. Secondly, the Report describes the rape victim as a much younger woman.

⁸⁷ See also Russell, Diana E.H, *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 94 – 96 in which Russell analyses three examples of bestiality pornography.

⁸⁸ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 32

⁸⁹ Gossett, J.L. and Byrne, S “‘Click here’: A Content Analysis of Internet Rape Sites” (2002) 16(5) *October Gender & Society*, 689-709 quoted in Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 32

⁹⁰ Id, 32

⁹¹ Id, 33

This is the second hierarchy of age. The older male sexually assaults the younger female. With age comes power and experience. With youth comes powerlessness and vulnerability. This kind of pornography sexualises these hierarchies, thereby making them acceptable to the viewer.

An example given by the first AI Report of what can be viewed on a rape focused web site is a photograph of a young woman who is bound, naked and in visible pain.⁹² The narrative associated with the photograph reads as follows:

“These teenagers’ hell is your pleasure. They are stretched, whipped, raped, and beaten. Their tits are crushed, twisted, pierced, thrashed and tortured. Their cunts are opened, whipped, entered with HUGE objects, sewn up, torn, and ripped. Their asses are beaten until bloody, stretched with baseball bats, used as target practice for darts...they scream, cry and plead.”⁹³

This is an example of hierarchies that perpetuate inequality at work. Here we see the complete disregard for the humanity of young teenage women. They exist solely to be used and abused for older males’ sexual pleasure. The older, stronger, active male uses the younger, weaker, passive female for his sexual pleasure. In addition, the first AI Report, in its discussion of violence in pornography, identifies another web site, “Her first Gangbang” in which a gang rape is presented. The first AI Report states that the narrative accompanying this pornography is as follows:

“We knew we had to split her cunt like a log, so we stuffed 2 big cocks in her tight pussy until she was stuffed like a butterball turkey!...I throat fucked her, while he split her cunt...Finishing with a brutal facial on her virgin face...Another girl, another first gangbang. It’s all in a day’s work, here at the office!”⁹⁴

⁹² Ibid

⁹³ Ibid

⁹⁴ Id, 32

These narratives sexualise the infliction of pain, mutilation, sexual torture and degradation on non-consenting very young women. There is a strong gender hierarchy of the male as the dominant aggressor and the female as the submissive object to be used for male sexual pleasure. Women are less than human in these narratives. They are dart boards, targets, turkeys and logs. They are unidentified “girls” and “teenagers”. This failure to identify these young women as human beings further objectifies them as even less than second class citizens. Instead, they are objects to be used by men and acted upon by men such as being ‘split’, ‘stuffed’, ‘stretched’, ‘whipped’, ‘raped’, ‘beaten’, ‘crushed’, ‘twisted’, ‘pierced’, ‘thrashed’, ‘tortured’, ‘sewn up’, ‘torn’, and ‘ripped.’

In the example immediately above, the woman victim is equated to an inanimate object. This inanimate object is a “log” which the narrative describes as being “split”. The woman is also described as another object, a “butterball turkey” which they have “stuffed”. Apart from the male subject, woman object hierarchy, there is also an extreme power hierarchy in the brute force of two men against one woman. The latter narrative also mentions “the office”. Pornography in an office or workplace context sexualises and thereby legitimates sexual harassment and unequal treatment of women in the workplace.⁹⁵ It also sends women the message that they are not safe anywhere, whether in the workplace, or at home.

⁹⁵ See also Russell, Diana E.H., *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 27 - 31 in which Russell analyses pornographic cartoons trivialising sexual harassment and assault in the workplace. See also Russell, Diana E.H., *Dangerous Relationships: Pornography, Misogyny, and Rape* (California: Sage Publications, 1998), 42—46 in which Russell analyses the same pornographic cartoons, however they are described instead of reproduced.

9 *Upskirts and “Peeping Toms”*

The third category of pornography identified by the AI Report is named “upskirts.” These are photographs taken so the viewer can literally see up the skirt of a woman.⁹⁶ The AI Report states that some of these pictures appear to be taken with the consent of the woman. This is doubtful, as part of the appeal of these web sites would seem to be the lack of knowledge and consent of the woman photographed. The Report does, however, acknowledge that some of the photographs appear to have been taken illicitly, without the women’s knowledge.⁹⁷ The Report describes the narrative on one such site as follows:

“Sexy Upskirts is a free site with sexy upskirt fetish showing panty pics. We have caught sexy upskirts of unexpected women. We have pics of sexy girls in hot panties and lingerie. Some of these women will be wearing short sexy dresses...We have nylon pics, leg pics, and even feet pics.”⁹⁸

A similar category called “*peeping Tom*” is also identified by the first AI Report. This category of pornography shows women showering, undressing, toileting, naked or having sex which appear to be taken through windows or using hidden cameras.⁹⁹ Ortiz discusses another category of “voyeur web sites” such as “VoyeurDorm.com” in which 6 “sexy young college girls” live in a house in which video cameras or web cams record their activities in the house, including showering, toileting and undressing.¹⁰⁰ The Report also

⁹⁶ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 33

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ortiz, Francesca, “Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws”, (2001) 34 *U.C. Davis L. Rev.* 929, 933 – 934

gives the example of a web site called, “sex spy” which boasts “over 100,000 voyeur images!, live hidden cams!, 50,000 movies!”.

In upskirts, peeping Tom and voyeur web sites it is women who are being watched and men who are watching. Men have power over women by watching women. Women do not have power because they do not know they are being watched and often have not consented to being watched. It is very likely that if women knew people were looking up their skirts, watching them showering, toileting or undressing, they would feel embarrassed, humiliated and violated. Watching another without consent is also a predatory act in which men obtain sexual pleasure from watching women without their consent.

10 *Child pornography*

The first AI Report also comments that although child pornography is no longer easily accessible (perhaps due to strict child pornography laws), it is still accessible via the internet. The Report gives the example of research by Taylor, Quayle and Holland in 2001, who found a UK database on child pornography which has amassed over 80,000 pictures and over 400 video clips, with over 1000 illegal photographs being posted each week.¹⁰¹

The Report also comments that the internet has been a crucial part of the development, distribution, production and consumption of child pornography.¹⁰²

¹⁰¹ Flood, Michael and Hamilton, Clive, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 23 and 34

¹⁰² Ibid

Despite the illegality of child pornography, the genre of “teen pornography” with titles such as “barely legal”, “youngest teens on the net”, “Lolita” and “Schoolgirl” is readily available on the internet.¹⁰³ The internet also depicts numerous web sites whose theme is “incest” as listed above in Table 6. The first AI Report also notes that some “teen” pornographic web sites also have themes of “sexual predation” and gives the example from the web site “iinocent.com”:

“Your neighbor’s daughter uncensored! You are seconds away from watching true Amateur Teens totally nude and spreading their young Twats! Some even get fucked!”¹⁰⁴

Internet pornography of very young women, including schoolgirls and incest is a further example of the inequality and the gendered hierarchies’ pornography promotes. A distinct hierarchy is created between the older male father figure who has power over the younger female (or the female child). This pornography sexualises inequality between man and child and promotes sexual abuse of children in the home.

11 *Feeders*

Although Table 6 of the First AI Report identifies that there are web sites showing “fat” or “chubby chicks”, it does not mention the availability of web sites dedicated to the overfeeding of women by men. The men are known as “feeders”, “fat admirers” or “FA’s” and the women as “feedees”. As one web site explains:

“...a FEEDER is a person who enjoys encouraging and/or helping another person to gain weight. A FEEDEE is a person who enjoys gaining weight, especially when assisted by a feeder, and in the context of a sensual and/ or sexual relationship.”¹⁰⁵

¹⁰³ Ibid

¹⁰⁴ Id, 24

However, the reality of the feeder/feedee relationship is not as harmless as this quotation at first appears to suggest. The next paragraph on this web page states, “My favourite sexual fantasy is to be grown to such enormous proportions that I am over a thousand pounds and can barely move.”¹⁰⁶ This is essentially the crux of the feeder/feedee relationship. The aim of a feeder is to increase the weight of a woman to such an extent that she cannot move unassisted, or at all, and must rely solely on the feeder to feed, wash and clothe her, often to the extent that her health is in serious danger:

“...fat admirers...like their women very very large and some will go to any lengths to get them like that. As their women reach dangerously high weights, they become increasingly reliant on their FA partners – to the point where they cannot walk, stand, clean or help themselves in any way.”¹⁰⁷

Feeders find the size of these women and in particular, their powerlessness and dependence sexually attractive. Part of the appeal for a feeder is challenging social taboos on weight gain. As one web page explains:

“Most women love to eat, there is a big diet problem though. This makes breaking the diet a naughty thing, a sexual thing. What a feeder dreams of is a person who just eats and eats. One who loves themselves fat, wants to get fatter and fatter. Such people exist.”¹⁰⁸

Some of the web sites devoted to the feeder/feedee relationship discuss and promote the surreptitious feeding of women, and even the force-feeding of women in order for them to gain so much weight that they become completely helpless. One site discusses strategies

¹⁰⁵ This quotation is from a web page named “Fat Admirers Haven” located at <http://www.geocities.com/Area51/Zone/4984/fatadmirers.html>, accessed 11 July 2005

¹⁰⁶ Ibid

¹⁰⁷ “Fat fantasy or sexual abuse” located at http://channel4.com/health/microsites/0-9/4health/food/ove_feeders.html accessed 11 July 2005

¹⁰⁸ “Feeder Profile” located at <http://www.feeder.co.uk/profile.html> accessed 11 July 2005

for surreptitiously ensuring that a woman overeats when taken out to a buffet dinner by manipulating the woman with flattering comments and by trying to distract her from noticing how much she is eating.¹⁰⁹ This narrative on this web page states that after making sure the woman stays seated, the man tips the waiter to make sure no empty plates build up. The man also keeps bringing the woman plates of food which are not too overloaded so as to make the woman feel full. The man also engages the woman in her favourite topics of conversation so that she does not notice how much she is eating.¹¹⁰ The narrator then states:

“She struggles to finish it but you compliment her on her efforts, encourage her to continue and remind her that it’s not even a full plate. With some effort she finishes. You congratulate her on her fine effort and mention that it would be a shame to leave without having some soft-serve ice cream. Reluctantly she agrees and you run to fetch it. Returning to the table you explain to your mate that they had just put out some fresh brownies so you brought her one with ice cream. You tell her that you’ll be really proud of her if she finishes both. With a great deal of effort, complaining that she feels like she’ll explode at any moment, she finished. You shower her with praise and mention there’s some ‘yummy’ cookies out now. You talk her into ‘just one’ of the pancake sized cookies ‘for the road’. You bring her two. As you help her up from the table you notice the jumper is straining now to contain her swollen belly. As she holds it, saying she’s never been so full in her life, you comment how sexy she is right now...”¹¹¹

Another web site discusses the force feeding of women:

“Force-Feeding:

The feedee is ‘abducted’ or seized, tied down and then force fed. Usually feeding pulp is used as material. The hot thing is that the feeder is the only one that can control how much the feedee has to eat and he can overfeed her deliberately (you

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

know that you are full and then some). Feedees that like this style are usually prone to heavy feeding and hard handling and get excited at being forced to fatten up.”¹¹²

This site also refers to force feeding in its definition of a feedee: “...some need the special kick to be treated as a feeding pig and being force fed like an animal.”¹¹³ The “feeding pulp” referred to in this quotation is defined as follows:

“Feeding pulp:

Liquid that is mostly made of fat. Is designed to fatten up the feedee with speed. Feedees that like feeding pulp usually prefer to fatten up considerably in short time or they do get excited at the prospect of having a high yield fat bomb in their gut that will in some days inflate their bellies. You could say it is sweet anticipation.”

This web page also contained stories about overfeeding women. In one of these stories a woman is fed a fattening drug, developed by a scientist but previously only tested on pigs. The drug immediately bloats her to four times her normal size. She dies by being suffocated in her own fat, but not before having several orgasms as her size increases.¹¹⁴

From an equality perspective, these web sites are extreme examples of relationships of dominance and submission and power and powerlessness. The preceding web page actually states the following as a reason why “feeding is fun and cool”:

“The thrill of domination/submission (to control/ to be controlled). The feedee is tied down like a prisoner and forced to eat, shown how she gets fat by pictures. It’s not the feedees intention to fatten up, but an erotic kick to be forced to do it.”

Male feeders dehumanize and debilitate women into a state of extreme dependence and helplessness by encouraging excessive weight gain to an extent that could permanently

¹¹² “Introduction to Feeding” located at http://rubensfeeder.tripod.com/intro/newbie_intro_e.html accessed 11 July 2005

¹¹³ Ibid

¹¹⁴ This story is located at <http://go.to/fatten> accessed 11 July 2005

harm the health of the woman and ultimately result in her death. These relationships constitute "...female helplessness – encouraged and engineered by male partners – that pushes fantasy over the border into abuse"¹¹⁵ and where consent is questionable. Even if a woman initially consents to be a feedee, the feeder empowers her to such an extent, and put her in such a position of dependence that she is unable to withdraw it.¹¹⁶

12 *Women and machines*

Another category of internet pornography not included in Table 6 of the Australia Institute Report is pornography made of women being penetrated by "fucking machines". A "Google" search of "women and fucking machines" revealed 1,250,000 hits in 0.31 seconds.¹¹⁷

An example is www.fuckingmachines.com is a web site devoted to women being penetrated by extremely large, cumbersome, industrial, robotic looking machines.¹¹⁸ The machines have a large protruding dildo, of various colours and sizes that is used to penetrate the women in a fast, thrusting motion. There are over 20 pages of free pornography of women being "fucked" by these machines.¹¹⁹ The machines have names such as, "the Predator", "Fuck Rogers", "the Trespasser", "the Intruder 2", "Crystal

¹¹⁵ "Fat fantasy or sexual abuse" located at http://channel4.com/health/microsites/0-9/4health/food/ove_feeders.html accessed 11 July 2005

¹¹⁶ Ibid

¹¹⁷ "Google" is located at www.google.com.au. This Google search was conducted on 12 July 2005

¹¹⁸ www.fuckingmachines.com accessed 12 July 2005

¹¹⁹ These 20 pages of pornography are located at www.fuckingmachines.com/updates/full1.php accessed 12 July 2005

Palace”, and “CycloRock”.¹²⁰ There are also other machines used on the women including “titsuckers” which are suction cups which are attached to the nipples and breasts. The suction on the “titsuckers” looks very strong with some of the women’s breasts being entirely sucked into narrow cup like containers. These “titsuckers” are always used in conjunction with a “fucking machine”. In fact, much of the pornography on this web page has a bondage component with women being tied up with ropes, chains and leather straps and hung upside down whilst being penetrated by a machine or machines. Women are also penetrated both orally and vaginally at the same time by machines.

This type of pornography debases and degrades women by showing they want sex so badly that they are willing to be aggressively penetrated by machines. Women are penetrated and pummelled by large machines that can no doubt cause serious internal damage to the woman, and are shown as enjoying this treatment. There are even close up photographs of women’s vaginas that have been stretched from being pummelled by machines.¹²¹ For example, commentary above some of the pornography on this site states:

“One look at this shoot, and you’ll see why Gia Paloma won AVN’s ‘Best New Starlet’ award. She force-gagged herself so hard on the 9 inch dong on the Mini-Mite, her slobber shorted out the pussycam! Next, I hung her inverted, with the Fucksall hanging between her legs, and an inflatable dildo-gag in her mouth. Finally, there’s a long ‘Chinese finger trap’ scene with the Hammer and the Intruder 2. She swaps back and forth between the machines with a gag-fest of deep oral and A2M action with the big green dong.”¹²²

¹²⁰ The web page features details of 45 different “fucking machines” and a link to a separate web page where these machines can be purchased at www.fuckingmachines.com/meetthemachines/ accessed 12 July 2005

¹²¹ See www.fuckingmachines.com/updates/full1.php accessed 12 July 2005

¹²² This is an example of the commentary provided at the beginning of each set of pornographic photographs and is located at www.fuckingmachines.com/updates/full1.php accessed 12 July 2005

Often, the women in the commentary are described as “intelligent” or as professional women such as lawyers and nurses. The following is an example of commentary on this web site that debases and dehumanises professional women. Note that this professional woman, an attorney, is debased and dehumanised by machines in her own office:

“Nadia, a high-powered prosecuting attorney, has spent a long day poring over her briefs. When quitting time rolls around, her bureau transforms in a myriad of subtle ways – from the executive office to the executive orifice. She takes depositions from the rocker; the crystal palace; the snake; and the monster. We all know prosecuting attorneys do it hard and fast, and Nadia is no exception. But after an hour of vigorous machine fucking, Nadia decides it’s really quitting time after all. She gathers her papers and heads home to get some rest for tomorrow’s court appearance.”¹²³

The message given by this web site is that it does not matter who the woman is, or what her profession is, she, like all women, desires to be fucked by a machine. It is an example of pornography’s hatred of women and of the ability of the internet to expand and widely distribute new messages of inequality. As the above quotation indicates, women, regardless of their status in society, are rendered so worthless that their only means of existence is to enjoy being raped by machines to satisfy men sexually. Women are denied equal participation in society by being debased and dehumanised in their own workplaces. They are reduced from being credible professionals to debased and dehumanised sexual objects.

III. SUMMARISING PORNOGRAPHY ON THE INTERNET

Pornography on the internet is prolific and, as the first AI Report illustrates, is easy to find, whether one is looking for it or not. The internet provides easy and often free access to an array of pornography, including violent material including rape and incest pornographic

¹²³ Ibid

web sites. The internet makes pornography accessible in the private sphere of the home, a place where women and children are often sexually and physically abused.¹²⁴

As we have seen in this chapter, the kinds of pornography available via the internet are predicated upon inequality and sexual hierarchy. In the next two chapters, legal approaches to regulation will be examined in order to further demonstrate why internet pornography should be regulated as a matter of sex discrimination, rather than censorship/ obscenity.

¹²⁴ Note that I do not intend to focus on child pornography as this has received much academic attention elsewhere and is beyond the focus of this thesis.

CHAPTER 3

AUSTRALIA'S APPROACH TO REGULATION: CENSORSHIP

I. AN INTRODUCTION TO REGULATION

This chapter will outline what Australia is attempting to do about pornography. More particularly, this chapter will outline Australia's censorship legislation, including the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and the *Censorship Act 1996* (WA).¹ Particular focus will be given to the *Broadcasting Services Act 1992* (Cth)² which specifically regulates internet content on the basis of immorality.³

¹ Although the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ("Classification Act") and the *Censorship Act 1996* (WA) ("Censorship Act") do not specifically address internet pornography, an examination of this legislation is warranted because it is the basis for the regime adopted by the *Broadcasting Services Act 1992* (Cth) ("Broadcasting Services Act"). The *Broadcasting Services Act* also relies on the classifications for films in the Classification Act to classify internet content.

² *Broadcasting Services Act 1992* (Cth) ("Broadcasting Services Act")

³ This chapter will not discuss the recent *Spam Act 2003* (Cth) ("*Spam Act*") which regulates the sending of electronic mail (e-mail), including unsolicited e-mails, a method often utilised by internet pornographers as an advertising tool. This is because the *Spam Act* is not to protect society from moral harm, but rather to prevent the commercial inconvenience and administrative costs businesses will incur from receiving unsolicited e-mails.

Note also the *Crimes Act 1914* (Cth) ("*Crimes Act*") which concerns internet offences, in particular, for harassing or threatening behaviour. Part VIIB of the *Crimes Act* which contained section 85ZE which prohibited the use of a "carriage service" to menace or harass a person in an offensive manner has now been repealed by the *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Act (No. 2) 2004* (Cth). Telecommunications offences are now dealt with in Part 10.6 of the *Criminal Code Act 1995* (Cth) ("*Criminal Code*").

A "carriage service" is defined in the Dictionary to the *Criminal Code* as having the same meaning as in the *Telecommunications Act 1997* (Cth) ("Telecommunications Act"). Section 7, the definitions section of the *Telecommunications Act*, defines a "carriage service" as "a service for carrying communications by means of guided and/ or unguided electromagnetic energy." This would include the internet, e-mail and the transmission of text and photographic messages via mobile telephone.

Section 474.15 makes it an offence to use a carriage service to make a threat ("*threat*" is defined in the Dictionary to the *Criminal Code* to include "a threat made by any conduct, whether express or implied and whether conditional or unconditional") where the person making the threat intends the person threatened to fear that the threat will be carried out. This section includes threats to kill (*Criminal Code*, s 474.15(1)) which are punishable by ten years imprisonment and threats to cause serious harm (*Criminal Code*, s 474.15(2)) which are punishable by 7 years imprisonment. It is also an offence, punishable by 10 years imprisonment to make a hoax threat "with the intention of inducing a false belief that an explosive,

This chapter will show that this legislation (which is morality based) does nothing to recognise or address the harms of pornography identified in chapter 1.

dangerous or harmful substance or thing has been or will be left in any place". Finally, section 85ZE of the *Crimes Act* was specifically replaced with section 474.17 which makes it an offence, punishable by up to 3 years imprisonment, to use a carriage service to menace, harass or cause offence "in a way that reasonable persons would regard in all the circumstances as being menacing, harassing or offensive".

In addition, this thesis will not examine the *Customs Act 1901* (Cth) which is another means of regulating of pornography based on morality because it does not relate to the internet. This Act restricts the importation of pornography and other "*objectionable material*". Section 50(3)(a) of the *Customs Act* provides that the *Customs (Prohibited Imports) Regulations 1956* (Cth) ("Regulations") may require that "the importation of goods is prohibited unless a license, permission, consent or approval to import" is granted. Regulation 4A named "Importation of objectionable goods" is the relevant regulation with regard to the importation of pornography. Its basis is regulation with reference to standards of morality and decency, as indicated by my italics:

"This regulation applies to publications and any other goods, that:

- (a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or *revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults* to the extent that they should not be imported; or
- (b) describe or depict *in a way that is likely to cause offence to a reasonable adult*, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not)....."

"Publication" is defined in Regulation 4A(1) as "any book, paper, magazine, film, computer game or other written or pictorial matter." Regulation 4A, and in particular the importation of materials that depict sex in a manner that is likely to "offend against the standards of morality" has been considered in the cases of *Chance International Pty Ltd v Forbes and Another* (1968) 12 FLR 425 (Supreme Court of New South Wales, Helsham J) ("*Chance International*") and *Altman v Forbes* (1970) 91 W.N (NSW) 84 (District Court of New South Wales, Levine DCJ) ("*Altman*").

In *Chance International* Helsham J stated that he was required to consider the magazine "as a whole" (at 432) in accordance with "the standard of contemporary morality in sexual matters of the community" (430):

"...that test is whether the goods taken as a whole deal with matters of sex in a way that does not measure up to the ordinary decent standards of morality of the Australian community at the present time."(at 428)

In *Altman* Levine DCJ (at 85) summarised the test for determining whether publications were "prohibited imports" as follows:

"...the words 'indecent', 'obscene', 'unduly emphasize matters of sex', 'likely to encourage depravity', as appearing in the regulation, are for the purposes of this case to be construed together, so that a book intended for the regulation to be prohibited is the one which, by reason of the extent to which and the manner in which it deals with sexual matters transgresses the generally accepted bounds of decency of the average man or woman in the community in sexual matters."

II. CENSORSHIP

The first approach to regulation is through a censorship model that defines the harms of pornography in terms of undermining society's moral fibre. The relevant censorship legislation includes the *Classification Act*, the *Censorship Act*, and the *Broadcasting Services Act*. The *Broadcasting Services Act* specifically aims to address internet pornography.

A. *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*

The *Classification Act* came into effect on 1 January 1996, having received Royal Assent on 15 March 1995.

B. *National Classification Scheme*

The purpose of this Act is “to provide for the Classification of publications, films and computer games for the Australian Capital Territory...[and] is intended to form part of a Commonwealth/State/ Territory scheme for the classification of publications, films and computer games and for the enforcement of those classifications.”⁴

The Act also provides that the Commonwealth may come to an arrangement with a State or a Territory whereby the Commonwealth may “exercise powers and perform functions relating to the classification of publications, films and computer games.”⁵ There is such an

⁴ *Classification Act*, s 3

⁵ *Classification Act*, s 4

arrangement in place between the Commonwealth and the States and Territories whereby the Commonwealth Classification Board (based at the Office of Film and Literature, in Sydney) is responsible for classification, and the States and Territories are responsible for enforcement.⁶

C. *Classification Board*

The Classification Board considers applications for classifications of publications, films and computer games.⁷ The Act establishes the Classification Board.⁸ The Board consists of a Director, a Deputy Director, Senior Classifiers and other members.⁹ The members are appointed by the Governor-General¹⁰ and when appointing members to the Classification Board, “regard is to be had to the desirability of ensuring that membership of the Board is broadly representative of the Australian Community.”¹¹ Before recommending the appointment of a member, the Commonwealth Minister must consult with “participating Ministers.”¹² The Board’s primary role is to safeguard “offensive” materials from the

⁶ See Office of Film and Literature Classification Web Page for *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia relating to a revised co-operative legislative scheme for censorship in Australia* located at <http://www.oflc.gov.au/resource.html?resource=215&filename=215.pdf> accessed 17/1/05

⁷ *Classification Act*, Part 2, Division 2 and s 10(1)

⁸ *Classification Act*, s 45

⁹ *Classification Act*, s 46

¹⁰ *Classification Act*, s 48(1)

¹¹ *Classification Act*, s48(2)

¹² *Classification Act*, s 48(3). In summary, a “Participating Minister” is defined in s 5 as “a Minister of a State or Territory who is responsible for censorship matters where the State or Territory is a participant in the scheme referred to in section 3...”

public that may undermine the moral fibre of those who view them. The fact that the Board is comprised of members of the community appointed by the Governor-General after ministerial consultation is again intended to be a safeguard to ensure that the Board will impose a majority (heterosexual male) view of what is offensive, and therefore of what should be censored as morally harmful.¹³

The Procedure of the Board is governed by Part 6, Division 4. The “Director”¹⁴ determines the Board’s procedures¹⁵ and convenes the Board’s meetings.¹⁶ Five members of the Board constitute a quorum¹⁷ and questions arising at a Board meeting are to be determined by a majority of votes.¹⁸ If members of the Board are divided in opinion, the decision of the majority prevails.¹⁹ If the Director is sitting on the Board and the vote is equally divided, the Director had a casting vote as well as a deliberative vote.²⁰ If the Director is not sitting on the Board, the Director can alter the constitution of the Board by adding one or more members.²¹ In considering a matter regarding the classification of a publication, film or

¹³ The “majority (heterosexual male) view” I refer to as being imposed by the Board is an ideological one and is applicable regardless of whether the members of the Board are male or female.

¹⁴ “Director” is defined in s 5 of the *Classification Act* as “the Director of the Board”

¹⁵ *Classification Act*, s 57

¹⁶ *Classification Act*, s 58(1)

¹⁷ *Classification Act*, s 58(5)

¹⁸ *Classification Act*, s58(6)

¹⁹ *Classification Act*, s 57(3)

²⁰ *Classification Act*, s57(4)(a)

²¹ *Classification Act*, s57(4)(b)

computer game, only members who have read the publication, seen the film or computer game may vote on the matter.²²

D. Applications for Classification

Applications for the classification of films must be in writing,²³ made in a form approved by the Director²⁴ and signed by or on behalf of the applicant.²⁵ Approval for the classification of films must be accompanied by the prescribed fee, a copy of the film and “an adequate written synopsis of the film in English that includes a statement or summary of any incidents, or of the plot, depicted or intended to be depicted by the film.”²⁶ When the Classification Board has reached a decision in relation to the classification of a film, publication or computer game, the Director must issue a certificate which must include the marking, consumer advice and any display obligations.²⁷ The Director must also give written notice of the Board’s decision to the applicant as soon as practicable but no later than 30 days after the decision.²⁸

There is a right to appeal a decision of the Classification Board to the Classification Review Board. The persons who may apply for review are the Minister, the applicant for

²² *Classification Act*, s 57(7)

²³ *Classification Act*, s 14(1)(a)

²⁴ *Classification Act*, s 14(1)(b)

²⁵ *Classification Act*, s 14(1)(c)

²⁶ *Classification Act*, s 14(1)(d)

²⁷ *Classification Act*, s 25 (1) and (2)

²⁸ *Classification Act*, s 26(1) and (4)

classification, the publisher of the film, computer game or a “person aggrieved” by the decision.²⁹ Again, this appeals procedure is premised upon morality. For example, an appeal by a publisher may be on the ground that the film was not as offensive as the Board at first decided. An “aggrieved person”, or in other words a person who is *offended* by the material, may appeal on the basis that the material should receive a more restrictive classification or even be refused classification.

E. Classification Review Board

The Act establishes the Classification Review Board³⁰ consisting of a Convenor, Deputy Convenor, and at least three, but no more than eight other members.³¹ In order to perform its functions, the Review Board is to be constituted by at least three members nominated by the Convenor.³² The Convenor’s function is to ensure “the business of the Review Board is conducted in an orderly and efficient way”.³³ As with the Classification Board, the members of the Review Board are appointed by the Governor General³⁴ after a recommendation of the Commonwealth Minister after consultation with the participating Ministers.³⁵ In a similar fashion to the *Classification Act*, in appointing members “regard is to be had to the desirability of ensuring that membership of the Board is broadly

²⁹ *Classification Act*, s 42(1)

³⁰ *Classification Act*, s 72

³¹ *Classification Act*, s 73

³² *Classification Act*, s 78

³³ *Classification Act*, s 77

³⁴ *Classification Act*, s 74(1)

³⁵ *Classification Act*, s 74(3)

representative of the Australian Community.”³⁶ Again, this is to ensure that the moral views of the majority of the Australian community are imposed. In a similar fashion to the Classification Board, if the Review Board is divided in opinion, the opinion of the majority prevails³⁷ and if members are equally divided in opinion, the Convenor has a casting as well as a deliberative vote if the Convenor is sitting on the Board³⁸, or if not, the Convenor can alter the constitution of the Board by adding one or more members.³⁹

F. *The Classification Code and Guidelines*

The Act provides that publications, films and computer games are to be classified in accordance with the “Code and the classification guidelines” which are premised on moral standards of what is offensive and what is not.⁴⁰ The Minister may, with the agreement of each participating Minister, determine guidelines to assist the Classification Board apply the criteria in the Code.⁴¹ These guidelines must be published in the Gazette.⁴² In addition, any amendments to the guidelines agreed between the Minister and each participating Minister must be published in the Gazette.⁴³ Previously, the Schedule to the *Classification*

³⁶ *Classification Act*, s 74(2)

³⁷ *Classification Act*, s 79(1)

³⁸ *Classification Act*, s 79(2)(a)

³⁹ *Classification Act*, s 79(2)(b)

⁴⁰ *Classification Act*, s 9

⁴¹ *Classification Act*, s 12(1)

⁴² *Classification Act*, s 12(2). For a complete copy of the Guidelines, see: Office of Film and Literature Classification web page, “Guidelines for the Classification of Films and Computer Games” <http://www.oflc.gov.au/resource.html?resource=62&filename=62.pdf> accessed 19 July 2005

⁴³ *Classification Act*, s 12(3) and (4)

Act contained the *National Classification Code* (“the Code”), however, it is now available through the Office of Film and Literature Classification web page.⁴⁴ The Code can be amended from time to time by agreement between the Commonwealth Minister and each “participating Minister”.⁴⁵

The *Code* contains three separate Tables, each containing a column named “Description of publication” and a column named “Classification”. The first of the three tables is for publications, the second is for films and the third is for computer games. The “Description of Publication” column describes the kind of material that may be contained in the publication, film or computer game and contains frequent references to standards of morality and decency. The column next to it, named “classification” states the category of classification that should be attached to a publication, film or computer game meeting that description, for example “RC”, “X 18+”, “R 18+” and so on. The Table for Films is reproduced below by way of example. The references to morality have been highlighted:

“FILMS

Films are to be classified in accordance with the following Table:

Description of film	Classification
1. Films that: (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or <i>revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults</i> to the	RC

⁴⁴ Office of Film and Literature Classification web page, “National Classification Code” located at <http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf> accessed 19 July 2005.

⁴⁵ *Classification Act*, s 6(1), (2) and (3)

<p>extent that they should not be classified; or</p> <p>(b) describe or depict <i>in a way that is likely to cause offence to a reasonable adult</i>, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or</p> <p>(c) promote, incite or instruct in matters of crime or violence.</p>	
<p>2. Films (except RC films) that:</p> <p>(a) contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, <i>in a way that is likely to cause offence to a reasonable adult</i>; and</p> <p>(b) are <i>unsuitable</i> for a minor to see.</p>	X 18+
<p>3. Films (except RC films and X 18+ films) that are <i>unsuitable</i> for a minor to see.</p>	R 18+
<p>4. Films (except RC films, X 18+ films and R 18+ films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be <i>unsuitable</i> for viewing by persons under 15.</p>	MA 15+
<p>Films (except RC films, X 18+ films, R 18+ films, MA 15+ films) that cannot be recommended for viewing by persons who are under 15.</p>	M
<p>5. Films (except RC films, X films, R 18+ films, MA 15+ films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians.</p>	PG
<p>6. All other films.</p>	G

The *Code* commences with the following introduction, which again refers to standards of morality and “offensive” material:

“Classification decisions are to give effect, as far as possible, to the following principles:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of persons in a demeaning manner.”

The “Classification Guidelines” referred to in sections 9 and 12 of the *Classification Act*, give further guidance to members of the Board in reaching a classification: “They help explain the different classification categories, and the scope and limits of material suitable for each category.”⁴⁶ There are in fact two separate Guidelines. The first is for the classification of publications, namely the *Guidelines for the Classification of Publications*.⁴⁷ The second of the Guidelines are the *Guidelines for the Classification of Films and Computer Games*.⁴⁸

This chapter will focus on the *Guidelines for the Classification of Films and Computer Games* (“*Guidelines*”) because these are the Guidelines relevant to the regulation of internet content under the *Broadcasting Services Act*, discussed below. The *Guidelines*

⁴⁶ Office of Film and Literature Classification web page, “Guidelines for the Classification of Films and Computer Games” <http://www.oflc.gov.au/resource.html?resource=62&filename=62.pdf> accessed at 19 July 2005, page 1

⁴⁷ Office of Film and Literature Classification web page, “Guidelines for the Classification of Publications”, <http://www.oflc.gov.au/resource.html?resource=63&filename=63.pdf> accessed at 19 July 2005

⁴⁸ Office of Film and Literature Classification web page, “Guidelines for the Classification of Films and Computer Games” <http://www.oflc.gov.au/resource.html?resource=62&filename=62.pdf> accessed at 19 July 2005

commence with three essential principles underlying the guidelines. These are: “the importance of context”; “assessing impact”; and “the six classifiable elements.”⁴⁹

The first principle outlined in the Guidelines is the “importance of context”. The Guidelines state, “context is crucial in determining whether a classifiable element is justified by the story-line or themes.”⁵⁰ “Elements” are defined in the Guidelines’ List of Terms as “Themes, violence, sex, coarse language, drug use and nudity.”⁵¹ This appears to mean that in classifying a film or computer game, the context in which an element such as “sex” appears will be relevant in assessing the classification of the film. For example, the Classification Board will consider whether or not sex is important to the character development or storyline of a film, as opposed to gratuitous sex. So, in other words, the context in which material appears may affect its classification.

The second principle outlined in the Guidelines is “assessing impact”.⁵² The *Guidelines* state that, when considering the category of classification, regard should be had to a hierarchy of impact as follows:

“	very mild	–	G
	mild	–	PG
	moderate	–	M
	strong	–	MA 15+
	high	–	R 18+
	very high	–	RC” ⁵³

⁴⁹ Id, 5

⁵⁰ Ibid

⁵¹ Id, 15

⁵² Id, 5

⁵³ Id, 5

In assessing impact, the *Guidelines* provide that the “cumulative effect” of individual classifiable elements must be considered, together with their “purpose and tone”.⁵⁴ The *Guidelines* continue by outlining how to assess the impact of a scene. In summary, if a scene contains greater detail, accentuation techniques, special effects, is prolonged, repeated frequently, realistic or “encourages interactivity”,⁵⁵ “impact may be higher.”⁵⁶ “Impact may be lessened” if a classifiable element is verbal rather than visual.⁵⁷

The *Guidelines* then set out “The Classifiable Elements” of a film or computer game. The *Guidelines* state:

“The six classifiable elements in a film or computer game are:

- themes
- violence
- sex
- language
- drug use
- nudity”⁵⁸

The *Guidelines* then outline the classification categories for films and computer games: G, PG, M, MA 15+, R 18+, X 18+ and RC, using a Table for each category. Each Table

⁵⁴ Id, 6

⁵⁵ Interactivity includes the use of incentives and rewards, technical features and competitive intensity” (*Guidelines* at 6) The definition goes on to say that “As a general rule: except in material restricted to adults, nudity and sexual activity must not be related to incentives or rewards”. The definition concludes with, “material that contains drug use and sexual violence related to incentives or rewards is Refused Classification.”

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Id, 7

commences with a description of the “impact test” for that category, followed by a list of each classifiable element (themes, violence, and so on), which includes a general description of the permissible treatment of each classifiable element. By way of example, the section of the *Guidelines* regarding an R 18+ classification is reproduced below:

“ Impact test

The impact of the material classified R 18+ should not exceed high.

Note: This classification category applies only to films. Material classified R 18+ is legally restricted to adults. Some material classified R 18+ may be offensive to sections of the adult community.

Classifiable elements

THEMES

There are virtually no restrictions on the treatment of themes.

VIOLENCE

Violence is permitted.

Sexual violence may be implied, if justified by context.

SEX

Sexual activity may be realistically simulated. The general rule is “simulation, yes – the real thing, no”.

LANGUAGE

There are virtually no restrictions on language.

DRUG USE

Drug use is permitted.

NUDITY

Nudity is permitted.”⁵⁹

G. Other Matters to be Considered When Determining Classification

⁵⁹ Office of Film and Literature Classification web page, “Guidelines for the Classification of Films and Computer Games” <http://www.oflc.gov.au/resource.html?resource=62&filename=62.pdf> accessed at 19 July 2005, pg 12

As well as having regard to the Code and the Classification Guidelines in reaching a decision about a classification, the *Classification Act* provides, in section 11 for “matters to be considered in classification”. Therefore, when making such a decision, the Board must have regard to the matters in section 11. Section 11 is reproduced below, and again refers to “standards of morality” which are highlighted in italics:

“11 Matters to be considered in classification

The matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include:

- (a) the *standards of morality, decency and propriety generally accepted by reasonable adults*; and
- (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
- (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.”

As mentioned above, there is an agreement between the Commonwealth and the States, under which the Commonwealth is responsible for Classification decisions and the States are responsible for enforcement. Enforcement is dealt with by the censorship legislation of the States and Territories, such as the Western Australian *Censorship Act*.⁶⁰

⁶⁰ See Office of Film and Literature Web Page for *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia relating to a revised co-operative legislative scheme for censorship in Australia* located at <http://www.oflc.gov.au/resource.html?resource=215&filename=215.pdf> accessed 17/1/05

H. *Censorship Act 1996 (WA)*

The agreement between the Commonwealth and Western Australia is contemplated by section 126 of the *Censorship Act*.⁶¹ Section 126 provides that a written arrangement can be made between Western Australia and the Commonwealth under which Western Australia can refer its functions with respect to the classification of films, computer games and advertisements to the Commonwealth. Section 126(3) provides that the agreement should contain a provision which states that it can be terminated by the Minister at any time. The Minister must publish a notice of the agreement being made or being terminated in the Government Gazette as soon as practicable after the date of the agreement or termination.⁶²

Section 23 of the Act provides that if an agreement is in force under section 126, films and computer games are to be classified in accordance with the National Classification Code set out in the Schedule to the *Classification Act* and the Classification Guidelines referred to in the *Classification Act*.

Unlike films and computer games which are classified by the Commonwealth, publications are still classified under the Western Australian *Censorship Act* because they are omitted from section 126 which refers to films and computer games only.⁶³ “Publications” are

⁶¹ *Censorship Act*, above n1

⁶² *Censorship Act*, s 126(5)

⁶³ See Office of Film and Literature Web Page for *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia relating to a revised co-operative legislative scheme for censorship in Australia*

defined in section 3 of the *Censorship Act* as “any written or pictorial matter” excluding films, computer games or advertisements for a films or computer games.

I. *Enforcement*

Part 9 of the *Censorship Act* sets out the enforcement provisions of the Act. The enforcement provisions are premised upon removing materials that offend standards of morality and decency from the public view. The *Censorship Act* contains wide powers of inspection and seizure.⁶⁴ For example, section 112(2) provides that a member of the police force or an “authorised person”⁶⁵ can enter a place where publications, films or computer games are sold, distributed, exhibited or demonstrated, or where a “computer service”⁶⁶ is being operated, at any reasonable time, without a warrant to inspect any articles and records kept on the premises. Section 112(3) provides that a member of the police force can then seize any thing they reasonably suspect is connected with an offence⁶⁷ against the *Classification Act*. The focus is therefore to remove “unsuitable” or “offensive” materials from the public view so they cannot deprave or corrupt those who view them and in turn, harm society’s moral fibre.

located at <http://www.oflc.gov.au/resource.html?resource=215&filename=215.pdf> accessed 17/1/05. See Recital A of Agreement.

⁶⁴ *Censorship Act*, s 112(2) and 112(3)

⁶⁵ Section 112(1) of the *Censorship Act* states that “the Minister may appoint a person as an authorized person for the purposes of subsection (2)”

⁶⁶ “Computer service” is not defined by the *Censorship Act*

⁶⁷ Section 111(1) sets out the meaning of a “thing...connected with an offence”. “...a thing is connected with a particular offence if – (a) the offence has been committed with respect to it; (b) it will afford evidence of the commission of the offence; or (c) it was used, or it is intended to be used, for the purpose of committing an offence.”

Part 9 of the *Censorship Act* also contains prohibitions against obstructing the police in performing their functions under the *Censorship Act*⁶⁸ and against making false or misleading statements.⁶⁹ Prosecutions must only be commenced after a film, publication or computer game has been classified, no later than 12 months after the classification date.⁷⁰ If a person is convicted of an offence under the *Censorship Act*, anything used to commit the offence or the subject of the offence can be ordered to be forfeited to the Crown.⁷¹

J. Offences

Part 7 of the *Censorship Act* deals with offences, in particular, “indecent or obscene articles,”⁷² and “child pornography.”⁷³ Section 59 contains prohibitions against selling or

⁶⁸ *Censorship Act*, s113

⁶⁹ *Censorship Act*, s 114

⁷⁰ *Censorship Act*, s 116(1). However, a prosecution for a child pornography offence under section 60 may be commenced at any time (s 116(2))

⁷¹ *Censorship Act*, s 117(1) and s 117(2)

⁷² “Indecent or obscene” is not defined in the *Censorship Act*, however “article” is defined in s 3 to include, “(a) a publication; (b) a film; (c) a computer programme and associated data; (d) a photograph’ (e) an object; (f) a sound recording; and (g) an advertisement for any article”

⁷³ As child pornography is beyond the focus of this thesis, I will provide only a brief outline as follows. Section 60 of the *Censorship Act* also makes it a crime to possess or copy child pornography with intent to sell or supply; or to sell or supply or offer to sell or supply child pornography with a penalty of 7 years imprisonment.

“*Child pornography*” is defined in section 3 of the *Censorship Act* as, “an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age (whether the person is engaged in sexual activity or not)” The definition of an “article” in section 3 of the *Censorship Act* includes “a computer programme and associated data”.

A person is also guilty of a crime, and liable to 5 years imprisonment, if they publish anything that conveys that the person publishes or supplies child pornography (s 60(2)(a)), or to publish an advertisement for child pornography (s 60(2)(b)). A person will also be guilty of a crime and will be liable to 5 years imprisonment if they display, exhibit or demonstrate child pornography (s 60(3)) or if they possess or copy child pornography (s 60(4)).

supplying an “indecent or obscene article”⁷⁴; publishing anything that conveys they publish or supply indecent or obscene articles⁷⁵; displaying, exhibiting or demonstrating an indecent or obscene article in a public place⁷⁶, or so as to be visible in a public place⁷⁷; possessing or copying an indecent or obscene article⁷⁸; or leaving “in or upon any place” an indecent or obscene article.⁷⁹ Again, these prohibitions primarily focus on protecting society from moral harm that may be caused by exposure to these materials.

Penalties for contravening these provisions are contained in sections 59(7) and 59(8). For a contravention of sections 59(1) and (3), a person commits an offence, which in the case of an individual could result in a penalty of \$10,000 or imprisonment for one year, or in any other case, a penalty of \$50,000.⁸⁰ For a contravention of sections 59(2), (4), (5) or (6) a person commits an offence, attracting a penalty of \$5,000 or 6 months imprisonment, or in

For example, in *R v Stephen Allan Jones* [1999] WASCA 24 the Court of Criminal Appeal of Western Australia upheld an appeal by the Crown against an 18 month suspended sentence, and substituted a sentence of 18 months imprisonment. The respondent (defendant) had pleaded guilty to one count of possessing child pornography under section 60(4) of the *Censorship Act*. The respondent (defendant) possessed over 162,600 child pornography images on his computer hard drives and CD-Roms.

If a person was in possession of or makes copies of 10 or more copies of a child pornography article, it is evidence of the intent to sell child pornography and in the absence of contrary evidence is proof of intent to sell (s 60(5)).

⁷⁴ *Censorship Act*, s 59(1)

⁷⁵ *Censorship Act*, s 59(2)

⁷⁶ *Censorship Act*, s 59(3)

⁷⁷ *Censorship Act*, s 59(4)

⁷⁸ *Censorship Act*, s 59(5)

⁷⁹ *Censorship Act*, s 59(6)

⁸⁰ *Censorship Act*, s 59(7)(a) and (b)

any other case \$25,000.⁸¹ If a person has possession of ten or more copies of an indecent or obscene article, it is evidence of intent to sell the article, and is proof in the absence of evidence to the contrary.⁸²

Division 3 of the *Censorship Act* contains restrictions in relation to the exhibition of films.⁸³ Films must not be exhibited in a public place unless the film has been classified, has the same title and is in the same form as when classified.⁸⁴ Films must also not be exhibited in a public place without a notice about the classification being displayed in a prominent place that is clearly visible to the public.⁸⁵ Division 3 also contains prohibitions against exhibiting a film that has been classified RC or X, or an unclassified film that would, if classified, be classified RC or X.⁸⁶ Again, these restrictions are designed to safeguard public morals in that materials must be classified (censored) by the Board as society's moral guardian before being viewed. Materials deemed by the Classification Board to be more offensive (RC or X) must be restricted from the public view so as not to corrupt society's moral fibre.

⁸¹ *Censorship Act*, s 59(8)(a) and (b)

⁸² *Censorship Act*, s 59(9)

⁸³ See also Division 2 of Part 7 of the *Censorship Act* in relation to publications and Division 4 of Part 7 in relation to computer games.

⁸⁴ *Censorship Act*, s 66

⁸⁵ *Censorship Act*, s 67(1)

⁸⁶ *Censorship Act*, s 68 and s 69

K. *Indecent or obscene*

As “indecent or obscene” is not defined by the *Censorship Act*, Australian case law on the meaning of “indecent or obscene” will now be examined in order to clarify its meaning. This is essential because the definition goes to the very root of a censorship/ morality based approach to regulation. According to a censorship approach, materials that are “indecent” or “obscene” have the potential to harm society’s morals and must be rendered unavailable or restricted by censoring them.

The term, “obscene” was considered in the case of *Hennessy v Lee*⁸⁷ by the Full Court of the Supreme Court of Western Australia. In this case, the appellant appealed a decision of the Court of Petty Sessions where he was convicted of selling an obscene picture contrary to section 2(1) of the *Indecent Publications Act 1902-1967*.⁸⁸ The appellant owned a retail shop named, “Orgy Shop” and was convicted of selling an obscene picture to the respondent policeman. The picture was described by Burt J as: “Printed on the paper are twelve pictures each comprising a female and a male figure in silhouette in an act of sexual intercourse...Above each picture there is a sign of the Zodiac and the name of it and beneath a single word, caption or title. Otherwise there is no printed text”.⁸⁹ The appellant argued, inter alia, that the magistrate was wrong in fact and in law in finding that the picture was obscene under the Act.⁹⁰ The appellant argued that the prosecution had not

⁸⁷ *Hennessy v Lee* [1973] WAR 127

⁸⁸ *Censorship Act*, s 153(1) which repeals the *Indecent Publications and Articles Act 1902* (WA)

⁸⁹ *Hennessy v Lee* [1973] WAR 127, at 127 – 128 (Burt J)

⁹⁰ *Id*, 129 (Burt J)

shown that the picture depraved or corrupted the policeman who was the purchaser. Burt J, with whom the other judges Virtue SPJ and Wickham J agreed, dismissed the appeal, stating that the word “obscene” did not require the purchaser to actually be depraved or corrupted by the picture.⁹¹

Burt J did not consider a general definition of “obscene” stating that: “The number of recently reported decisions and the volume of academic writings upon the subject of obscenity has persuaded me that the path of wisdom for me is to confine my remarks to the case in hand.”⁹² However, Burt J did offer some guidance as to how obscenity should be determined. He stated that the Magistrate or Judge must “judge the material by the contemporary standards of the community”⁹³ and that “aided by any relevant evidence and equipped with a measure of knowledge of the attitudes and beliefs which are widely held in the community, he makes a judgment concerning that publication”.⁹⁴ Burt J continued on to state that the fact the different community members have different standards “does not prevent him from having recourse to the touchstone of the broad standard or consensus of attitude which (in his judgment) exists within the community.”⁹⁵

⁹¹ Id, 128 (Burt J)

⁹² Id, 128 (Burt J)

⁹³ Id, 129 per Burt J

⁹⁴ Ibid

⁹⁵ Walsh J in *Neville v Lewis* [1965] NSW 1571 at 1586 quoted in *Hennessy v Lee* [1973] WAR 127, at 129 per Burt J

The term, “indecent or obscene” was also considered in the case of *Archbishop of Melbourne v Council of Trustees of National Gallery (Vic)*⁹⁶ in the Supreme Court of Victoria by Harper J. In this case, the Archbishop of the Catholic Archdiocese of Melbourne, Dr George Pell, applied to the court for an injunction restraining the National Gallery of Victoria from exhibiting a photograph called “*Piss Christ*” by the artist Andreas Serrano which showed a crucifix immersed in urine. The Archbishop argued that the photograph contravened section 17(1)(b) of the *Summary Offences Act 1966* (Vic) which provided that it is forbidden to exhibit or display an indecent or obscene figure or representation in a public place and within view of any person in that place. The Archbishop also claimed that:

“The public display of the work would constitute...the common law misdemeanour of publishing a blasphemous libel by reason of the fact that the photograph is so offensive, scurrilous and insulting to the Christian religion that it is beyond the decent limits of legitimate difference of opinion and is calculated to outrage the feelings of sympathisers with or believers in the Christian religion.”⁹⁷

Harper J rejected the claim of blasphemous libel because he doubted its reception into Australian law and its continued application, given that only one prosecution was instituted in Victoria this century which was withdrawn before trial.⁹⁸ Harper J was also of the opinion that “in order to amount to a blasphemous libel the matter complained of must raise the risk of a breach of the peace, perhaps general civil unrest”⁹⁹ as there was no evidence this would occur following the showing of the photograph.

⁹⁶ *Archbishop of Melbourne v Council of Trustees of National Gallery (Vic)* (1997) 96 A Crim R 575

⁹⁷ *Id.*, 576

⁹⁸ *Id.*, 578 - 580

⁹⁹ *Id.*, 580

However, in considering whether there had been a breach of section 17(1)(b) of the *Summary Offences Act 1966* (Vic), Harper J considered the meaning of the words “indecent or obscene” as follows:

“These words convey one idea – a failure to meet recognised standards of propriety. Such a failure at the lower end of the scale would amount to an indecency; and at the upper end of the scale would amount to an obscenity...Each of the words “indecent” and “obscene” are associated more with lewdness than with blasphemy.”¹⁰⁰

In refusing to grant the injunction restraining the exhibition of the photograph, Harper J also examined the dictionary definitions of “indecent” and “obscene”:

“...the definition of “obscene” in Butterworths Australian Legal Dictionary (1997) is as follows:
 ‘1. Filthy, bawdy, lewd, or disgusting.
 2. Unduly emphasising matters of sex, crimes of violence, gross cruelty, or horror, so as to offend against the common sense of decency.

In the same work the word “indecent” is defined as follows:
 ‘1. Unbecoming or offensive to common propriety.
 2. As an affront to modesty. An act is indecent if it would offend the ordinary modesty of the average person.’”¹⁰¹

Harper J also noted *The Macquarie Dictionary* (2nd ed, 1996) definition of the word obscene which included, “offensive to modesty or decency; indecent; inciting to lust or sexual depravity; lewd” and “abominable; disgusting; repulsive.”¹⁰² Harper J also noted that to determine whether the photograph was indecent or obscene, “the court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society...”¹⁰³

¹⁰⁰ Id, 579

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

The definition of “offensive” was again considered in the case of *Prime Minister John Piss the Family Court and Legal Aid v Minister for Foreign Affairs and Trade (No 1)*¹⁰⁴ which was decided by the Federal Magistrates Court of Australia. In this case, the applicant, John Zabaneh, who had changed his name to “Prime Minister John Piss The Family Court and Legal Aid” applied for an Australian Passport in the name of “Prime Minister John Piss Family Court - Legal Aid”. The applicant appealed two decisions to the Administrative Appeals Tribunal (“AAT”). The first was a decision whereby the Minister had affirmed a decision to cancel the applicant’s passport in the name of “Prime Minister John Piss Family Court - Legal Aid”. The second was the refusal to issue the passport in the name of “Prime Minister John Piss The Family Court and Legal Aid”. The AAT affirmed these two decisions and the applicant appealed to the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) on the ground that there had been an error of law. The Federal Court held that there was no error of law and that the appeal should be dismissed.

One of the respondent’s submissions was that there was no error of law because the decision maker had relied on paragraph 325 of the Manual of Australian Passport Issue which stated that: “An Australian Officer has discretion not to accept for inclusion in a passport any name, which acquired by Deed Poll or by reputation, which, on reasonable grounds, may be considered offensive. This discretion may be applied to names which are

¹⁰⁴ *Prime Minister John Piss the Family Court and Legal Aid v Minister for Foreign Affairs and Trade (No 1)* (2003) 175 FLR 43

considered offensive because they contain expletives....”¹⁰⁵ The respondent submitted that the meaning of the word “offensive” in this context should be as follows:

“The word “offensive” should be given its ordinary meaning and not that ascribed to it in the context of offensive behaviour in criminal law. Reliance was placed on the Macquarie Dictionary definition wherein “offensive” is defined as including: “1. causing offence or displeasure; irritating; highly annoying. 2. disagreeable to the sense...3. Repugnant to the moral sense, good taste or the like; insulting...” The Shorter Oxford English Dictionary provides in its definition: “2. Hurtful, injurious...3. Giving...offense; displeasing;...insulting.”¹⁰⁶

The Court accepted this “general dictionary meaning of offensive” to be the correct approach.¹⁰⁷ The Court also commented that:

“Again, applying the meaning of offensive found in the Shorter Oxford English Dictionary the AAT was entitled to conclude that the use of the title not legitimately acquired may be considered harmful to the holders of legitimately acquired titles and injurious to the people of the Commonwealth of Australia if it misleads people to believe that the applicant is the Prime Minister. Again, in my view it was open to the AAT to find that the use of that title may be offensive and could cause offence to both current and former Prime Ministers in Australia and other countries.”¹⁰⁸

As is evident from these cases, obscenity and indecency, which form the basis for Australia’s censorship legislation, are determined on the basis of what a reasonable person (man) would find offensive. The reasonable man is representative of current community standards; the standards of those who enjoy male privilege and who have the power to impose them. They are not the standards of the many women who are harmed and silenced by pornography. A consideration of what is obscene or indecent gives no consideration to these women. Rather, it renders the women used in pornography as obscene or indecent

¹⁰⁵ Id, 51 – 52

¹⁰⁶ Id, 52

¹⁰⁷ Id, 57

¹⁰⁸ Ibid

themselves. This will be discussed in more detail in chapter four. For the remainder of this chapter, however, it is important to outline the legislation relevant to regulating internet pornography which has this morality basis as its foundation.

III. BROADCASTING SERVICES ACT 1992 (CTH)

A. *Overview and background*

The *Classification Act* and the *Censorship Act* regulate the classification and enforcement of classifications for films, publications and computer games but do not regulate internet content, such as internet pornography.¹⁰⁹ Instead, internet content is regulated by the *Broadcasting Services Act* which adopts a morality based/ censorship approach to regulation in a similar manner to the *Classification Act* and the *Censorship Act*.

The *Broadcasting Services Act* was originally enacted to regulate radio and television broadcasting services and to establish the Australian Broadcasting Authority.¹¹⁰ Subsequently, the *Broadcasting Services Amendment (Online Services) Act (Cth) 1999* (“*Online Services Act*”) was enacted to amend the *Broadcasting Services Act* by inserting a new Schedule 5 named, “Online Services”. Schedule 5 aimed to address “illegal and offensive material online” including pornographic material and “material that is illegal or

¹⁰⁹ *Classification Act*, s 92 and *Censorship Act*, s 6

¹¹⁰ *Broadcasting Services Act*, section 154 establishes the Australian Broadcasting Authority (“ABA”). The ABA’s “primary functions” are set out in section 158 and include jurisdiction over granting, renewal and suspension of licenses under the Act, monitoring compliance with codes of practice, conducting investigations and hearings under the Act, and the like.

highly offensive, or may be harmful to children”¹¹¹. The Act’s basis in morality is evident by this reference to “offensive” and “highly offensive” material. The *Online Services Act* received both Royal assent and commenced on 16 July 1999.¹¹²

When Schedule 5 was originally enacted, the Australian Broadcasting Authority (“ABA”) was the authority responsible for administering the legislation and policing complaints concerning online content, such as pornography. However, the Act has recently been amended to make the Australian and Communications Media Authority (“ACMA”) the responsible authority. This is because as at 1 July 2005, the ABA merged with the Australian Communications Authority to form the ACMA.¹¹³ The Act was therefore amended to reflect this change in administration.¹¹⁴ Unfortunately, these amendments are to the Act’s administration and not to its content which is still premised upon protecting society from moral harm.

Senator Richard Alston’s Revised Explanatory Memorandum to the *Broadcasting Services Amendment (Online Services) Bill 1999* (Cth)¹¹⁵ states that the legislation was in response

¹¹¹ Senator Richard Alston, *Revised Explanatory Memorandum*, Broadcasting Services Amendment (Online Services) Bill 1999, at <http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm> accessed 26/8/05. The Revised Explanatory Memorandum takes into account the amendments made by the Senate to the original Bill.

¹¹² Notes to the *Broadcasting Services Act*

¹¹³ ACMA web page, “Broadcasting Legislation” located at <http://www.acma.gov.au/ACMAINTER.2097430:STANDARD:1612043171:PC=90004> accessed 18 July 2005

¹¹⁴ *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* (Cth)

¹¹⁵ Senator Richard Alston, *Revised Explanatory Memorandum*, Broadcasting Services Amendment (Online Services) Bill 1999, at <http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm> accessed 26/8/05.

to community concerns over the ease of access to illegal and offensive materials including pornography via the internet. Senator Alston provided the following overview of the Act¹¹⁶:

“The main elements of the proposed framework are that:

- a complaints mechanism will be established in which any person can complain to the Australian Broadcasting Authority (ABA) about offensive material online;
- material that will trigger action by the ABA will be defined, on the basis of current National Classification Board guidelines for film, as material Refused Classification and rated X, and material rated R that is not protected by adult verification procedures;
- the ABA will be given powers to issue notices to service providers aimed at preventing access to prohibited material which is subject to a complaint if it is hosted in Australia or, if the material is sourced overseas, to take reasonable steps to prevent access if technically and commercially feasible;
- indemnities will be provided for service providers to protect them from litigation by customers affected by ABA notices;
- a graduated scale of sanctions against service providers breaching ABA notices or the legislation will apply;
- subject to the ability of the Minister to declare that a specified person who supplies, or proposes to supply, a specified Internet carriage service is an Internet service provider, the framework will not apply to private or restricted distribution communications such as ordinary e-mail; however, current provisions of the *Crimes Act 1914 (Cth)* in relation to offensive or harassing use of a telecommunications service will apply in this context;
- a community advisory body will be established to monitor material, operate a ‘hotline’ to receive complaints about illegal material and pass this information to the ABA and police authorities, and advise the public about options such as filtering software that are able to address concerns about online content;
- the Commonwealth will be responsible for regulating the activities of Internet service providers and Internet content hosts and the Attorney-General will

¹¹⁶ Note that as mentioned above, due to the merger of the ABA with the Australian Communications Authority, references to the ABA should now be replaced with the ACMA.

encourage the development of uniform State and Territory offence provisions complementing the Commonwealth legislation (including section 85ZE of the *Crimes Act 1914*) that create offences for the publication and transmission of proscribed material by users and content creators.”

These elements will now be examined individually, with specific reference to the legislation to provide an overview of the *Broadcasting Services Act* regulates internet content.

B. *Complaints mechanism*

The *Broadcasting Services Act* establishes a complaints system whereby a person can make a complaint to the ABA regarding internet content. In effect, this means that the Act is largely reliant on members of the public complaining about materials, such as pornography, that they find on the internet and consider to be offensive. The relevant part of the legislation is Part 4, “Complaints to, and investigations by, the ABA”. Part 4 establishes a complaints process by which the ABA can receive and investigate complaints about “internet content”.¹¹⁷

¹¹⁷ “Internet content” is defined in clause 3, the definitions section, of Schedule 5 to the Act as follows:

“**Internet content** means information that:
 (a) is kept on a data storage device; and
 (b) is accessed, or available for access, using an Internet carriage service;
 but does not include:
 (c) ordinary electronic mail; or
 (d) information that is transmitted in the form of a broadcasting service.”

A “data storage device” is defined in section 3, the definitions section of the Act as “any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.” An “Internet carriage service” is defined in clause 3 of Schedule 5 as “a listed carriage service that enables end-users to access the internet”.

“Listed carriage service” is defined in clause 3 of Schedule 5 as having “the same meaning as in the *Telecommunications Act 1997*”. The *Telecommunications Act* defines a “listed carriage service” in section 16 as a carriage service between: a point in Australia or another point in Australia; a point or

C. *Complaints about prohibited content or potential prohibited content*

A member of the public can make a complaint to the ACMA if they believe internet users (“end-users”¹¹⁸) in Australia can access what is called “prohibited content” or “potential prohibited content”.¹¹⁹ Consequently, if a person encounters pornography on the internet, they can make a complaint to the ACMA. The fact that the person believes other internet users will have access to (be exposed to) the internet content would appear to give the complainant the role of a preliminary censor.

“Prohibited content” is defined in terms of whether internet content is hosted in Australia or outside Australia.¹²⁰ In relation to internet content hosted in Australia, prohibited content is that which has been classified RC or X 18+ by the Classification Board.¹²¹ In addition, prohibited content is also defined as content that has been classified R 18+ by the Classification Board¹²² if access to the Internet content is not subject to a restricted access system.¹²³ In summary, a restricted access system is one that restricts a child’s access to

one or more other points where the first point is in Australia and at least one of the other points is outside Australia; and a point and one or more other points where the first point is outside Australia and at least one of the other points is in Australia.

¹¹⁸ “End-user” is not defined, but appears to be a person using the internet

¹¹⁹ *Broadcasting Services Act*, Schedule 5, clause 22(1)

¹²⁰ *Broadcasting Services Act*, Schedule 5, clause 10

¹²¹ *Broadcasting Services Act*, Schedule 5, clause 10(1)(a)

¹²² *Broadcasting Services Act*, Schedule 5, clause 10(1)(b)(i)

¹²³ *Broadcasting Services Act*, Schedule 5, clause 10(1)(b)(ii) A “restricted access system” is defined in clause 4(1) somewhat ambiguously as follows:

“The ACMA may, by written instrument, declare that a specified access- control system is a restricted access system in relation to Internet content for the purposes of this Schedule. A declaration under this sub-clause has effect accordingly.”

internet content such as an age verification mechanism. So if internet content has been classified as R 18+ but is not protected by a restricted access system, it is “prohibited content”.

In relation to Internet content hosted outside Australia, content will be prohibited content if the Internet content has been classified RC or X 18+ by the Classification Board.¹²⁴

By way of summary, the type of material that is prohibited content is summarised on the ACMA web page as:

“The following categories of Internet content are prohibited:

Content which is (or would be) classified RC by the Classification Board

Such content includes:

- material containing detailed instruction in crime, violence or drug use;
- child pornography;
- bestiality;
- excessively violent or sexually violent material.

Content which is (or would be) classified X by the Classification Board

Such content contains:

- real depictions of actual sexual activity.

On its web page, the ACMA defines a “restricted access system” as follows:

“Restricted access systems are adult verification devices that allow only people who are 18 years or older to access adult material on the Internet. Restricted access systems protect children from exposure to material that may be unsuitable for them.” (ACMA web page, “Adult verification systems (restricted access)” located at http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714:pc=PC_90158 accessed 18 July 2005)

¹²⁴ *Broadcasting Services Act*, Schedule 5, clause 10(2)

Content hosted in Australia which is classified R and not subject to a restricted access system which complies with criteria determined by ACMA

Content classified R is not considered suitable for minors and includes:

- material containing excessive and/or strong violence or sexual violence;
- material containing implied or simulated sexual activity;
- material that deals with issues or contains depictions which require an adult perspective.¹²⁵

A person may also make a complaint to the ACMA if they believe internet users in Australia can access what is called “potential prohibited content”. “Potential prohibited content” is defined as Internet content that has not been classified by the Classification Board¹²⁶ and if it were to be classified by the Classification Board, there is a substantial likelihood that it would be prohibited content.¹²⁷ So in effect, the Act has adopted a complaints initiated censorship regime. An examination of what is accessible via the internet, such as that conducted in chapter 2, reveals that such a complaints based system is ineffective to regulate the prolific amount of pornography available via the internet, or to deter internet pornographers. For example, if “real depictions of sexual activity” are considered to be prohibited content, why do they remain extensively available via the internet?

¹²⁵ ACMA web page “Internet content complaints” located at http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714;pc=PC_90103 accessed 18 July 2005

¹²⁶ *Broadcasting Services Act*, Schedule 5, clause 11(1)(a)

¹²⁷ *Broadcasting Services Act*, Schedule 5, clause 11(1)(b)

D. Complaints about internet content hosts

The second category of complaints that can be made under the *Broadcasting Services Act* are complaints about Internet content hosts.¹²⁸ An “Internet content host” is defined as “a person who hosts Internet content in Australia, or who proposes to host Internet content in Australia.”¹²⁹ A person can also make a complaint to the ACMA if they have reason to believe that an Internet content host is hosting prohibited content or potential prohibited content in Australia.¹³⁰ Again, this involves a person using the internet finding such material and then acting as a preliminary censor in making the complaint.

E. Form of complaint

Complaints about prohibited content or potential prohibited content must identify the Internet content¹³¹; set out how to access the Internet content¹³²; if known, set out the name of the country or countries in which the Internet content is hosted¹³³; set out the reasons for believing the Internet content is prohibited or potential prohibited content¹³⁴; and such other information (if any) the ACMA requires.¹³⁵ The complaint must be in writing¹³⁶ or

¹²⁸ *Broadcasting Services Act*, Schedule 5, clause 22

¹²⁹ *Broadcasting Services Act*, Schedule 5, clause 3

¹³⁰ *Broadcasting Services Act*, Schedule 5, clause 22(2)

¹³¹ *Broadcasting Services Act*, Schedule 5, clause 22(3)(a)

¹³² *Broadcasting Services Act*, Schedule 5, clause 22(3)(b)

¹³³ *Broadcasting Services Act*, Schedule 5, clause 22(3)(c)

¹³⁴ *Broadcasting Services Act*, Schedule 5, clause 22(3)(d)

¹³⁵ *Broadcasting Services Act*, Schedule 5, clause 22(3)(e)

by an electronic transmission approved by the ACMA.¹³⁷ The complainant will not be entitled to make a complaint unless they are a resident of Australia¹³⁸; a body corporate that carries on activities in Australia¹³⁹; or the Commonwealth, a State or Territory.¹⁴⁰

F. Complaints about breaches of registered codes and online provider rules

The Act encourages self-regulation by internet service providers and internet content hosts by encouraging them to develop industry specific codes of practice. It allows for a body or association who represents a particular section of the internet industry to develop an industry code which can be registered with the ACMA.¹⁴¹ There is also provision for the ACMA to request that a body or association who represents a particular section of the internet industry to develop an industry code for submission to the ACMA.¹⁴² The Internet Industry Association drafted the current industry codes which were registered with the ACMA on 26 May 2005.¹⁴³ There are three codes of practice relating to the internet,

¹³⁶ *Broadcasting Services Act*, Schedule 5, clause 24(1)

¹³⁷ *Broadcasting Services Act*, Schedule 5, clause 24(2)

¹³⁸ *Broadcasting Services Act*, Schedule 5, clause 25(a)

¹³⁹ *Broadcasting Services Act*, Schedule 5, clause 25(b)

¹⁴⁰ *Broadcasting Services Act*, Schedule 5, clause 25(c). Note that clause 22(5) of Schedule 5 provides that a person cannot make a complaint about content occurring before 1 January 2000.

¹⁴¹ *Broadcasting Services Act*, Schedule 5, clause 62

¹⁴² *Broadcasting Services Act*, Schedule 5, clause 63

¹⁴³ ACMA web page, "Industry self-regulation" located at http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714:pc=PC_90162 Accessed 3 August 2005

developed by the Internet Industry Association.¹⁴⁴ The three Codes are contained in the one document and are available to the public on the ACMA web page.¹⁴⁵ The three Codes are named, “Content Code 1: Hosting Content within Australia”, “Content Code 2: Providing Access to Content Hosted within Australia” and “Content Code 3: Providing Access to Content Hosted Outside Australia.” The Codes provide guidelines for internet content hosts and service providers including requiring them to take steps to protect internet users from offensive content through the use of age verification systems, warnings and filtering software. The Codes also provide procedures for responding to directions and notices given by the ACMA and other authorities.

A person may complain to the ACMA if they believe that an Internet service provider or an Internet content host has contravened a registered code.¹⁴⁶ If the ACMA is satisfied that a person who is a participant in the internet industry has or is contravening an industry code, the ACMA can give written notice to the person to comply.¹⁴⁷ When this notice is given the person must comply,¹⁴⁸ but until this time, compliance is voluntary.

¹⁴⁴ ACMA web page, “Codes & standards” located at http://www.acma.gov.au/ACMAINTER.2097430:STANDARD:401669673:pc=PC_90080 accessed 19 July 2005

¹⁴⁵ ACMA web page, “Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992), 9 May 2002, version 10.4 (“the Code”) located at http://www.acma.gov.au/acmainterwr/aba/contentreg/codes/internet/documents/iia_code.pdf accessed 19 July 2005

¹⁴⁶ *Broadcasting Services Act*, Schedule 5, clause 23(a)

¹⁴⁷ *Broadcasting Services Act*, Schedule 5, clause 66(1)

¹⁴⁸ *Broadcasting Services Act*, Schedule 5, clause 66(2)

In the alternative, a person may make a complaint to the ACMA if they believe that the Internet service provider or Internet content host has contravened an “online provider rule” applicable to that host.¹⁴⁹ In summary, these online provider rules are those set down by the Act requiring compliance with various notices issued by the ACMA to remove offensive content.¹⁵⁰ For example, Internet content hosts must comply with notices issued by the ACMA such as an interim take-down notice, a final take-down notice, a special take down notice and any undertaking they give to the ACMA.¹⁵¹

G. Investigation of complaints by the ACMA

The Act also sets out the kinds of complaints that the ACMA must investigate. The ACMA must investigate complaints about prohibited or potential prohibited content¹⁵² and must notify complainants of the results of the investigation.¹⁵³ However, the ACMA need not investigate if it is satisfied that the complaint is frivolous, vexatious or not made in good faith.¹⁵⁴ Similarly, the ACMA need not investigate if it is of the view that the complaint was made for the purpose of frustrating or undermining the efficient administration of Schedule 5.¹⁵⁵ The ACMA may also investigate matters on its own

¹⁴⁹ *Broadcasting Services Act*, Schedule 5, clause 23(b)

¹⁵⁰ “Online provider rules” are listed in clause 79, and include the notices and directions listed in clauses 37, 48, 66(2), 72 and 80

¹⁵¹ *Broadcasting Services Act*, Schedule 5, clause 37(1), (2), (3) and (4)

¹⁵² *Broadcasting Services Act*, Schedule 5, 26(1)

¹⁵³ *Broadcasting Services Act*, Schedule 5, 26(3)

¹⁵⁴ *Broadcasting Services Act*, Schedule 5, clause 26(2)(a)

¹⁵⁵ *Broadcasting Services Act*, Schedule 5, clause 26(2)(b)

initiative if it thinks it desirable to do so.¹⁵⁶ The ACMA has the power to conduct investigations as it sees fit¹⁵⁷ and to obtain information from persons and make enquiries as it sees fit.¹⁵⁸

H. Material that will trigger action by the ACMA

As mentioned above, a complaint about, or an investigation by the ACMA that finds that internet content is “prohibited content” or “potential prohibited content” may result in action being taken by the ACMA.¹⁵⁹ Consequently, a complaint will result in the ACMA adopting a censorship role to determine whether or not the content should be removed. As discussed above, what constitutes prohibited content and potential prohibited content is defined by reference to the film classification categories of “RC”, “X 18+” or “R 18+”.

The Act also governs films available via the internet. The Act attempts to regulate internet films using existing classification categories for films.¹⁶⁰ If a film is available via the internet, and has already been classified by the Classification Board as a film under the *Classification Act*, the same classification will apply to the internet film.¹⁶¹ If the film available via the internet has not been classified by the Classification Board under the

¹⁵⁶ *Broadcasting Services Act*, Schedule 5, clause 27(1)

¹⁵⁷ *Broadcasting Services Act*, Schedule 5, clause 28(1)

¹⁵⁸ *Broadcasting Services Act*, Schedule 5, clause 28(2)

¹⁵⁹ *Broadcasting Services Act*, Schedule 5, clause 10 and 11

¹⁶⁰ *Broadcasting Services Act*, Schedule 5, clause 12

¹⁶¹ *Broadcasting Services Act*, Schedule 5, clause 12(1)

Classification Act, the Classification Board must classify the internet film in the same way as if it were a film.¹⁶²

Even if the Internet content does not consist of a film or computer game, it will still be classified in the same way as a film under the *Classification Act*.¹⁶³ Senator Alston in his revised Explanatory Memorandum gives the example of an advertisement for a film or a computer game which could be classified under clause 13 as if it were a film.¹⁶⁴

If such material is “prohibited content” or “potential prohibited content”, the ACMA will take action to remove the material.

I. Power of the ACMA to issue notices to service providers

Division 3 of Schedule 5 sets out the action to be taken in relation to a complaint about prohibited content hosted *in* Australia, whilst Division 4 sets out the action to be taken in relation to a complaint about prohibited content hosted *outside* Australia. This action primarily involves issuing notices ordering the removal (censorship) of internet content.¹⁶⁵

¹⁶² *Broadcasting Services Act*, Schedule 5, clause 12(2)

¹⁶³ *Broadcasting Services Act*, Schedule 5, clause 13

¹⁶⁴ Senator Richard Alston, *Revised Explanatory Memorandum*, Broadcasting Services Amendment (Online Services) Bill 1999, at <http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm> accessed 26/8/05

¹⁶⁵ When serving notices under this Division, the ACMA must sufficiently identify or describe the Internet content: *Broadcasting Services Act*, Schedule 5, clause 38

J. *Prohibited content hosted in Australia*

The Act provides that if, during an investigation, the ACMA is satisfied that Internet content hosted in Australia is “prohibited content”, the ACMA must give the Internet content host¹⁶⁶ a written notice directing them not to host the prohibited internet content.¹⁶⁷ This is called a “final take down notice.”¹⁶⁸

If, during an investigation, the ACMA is satisfied that the Internet content hosted in Australia is potential prohibited content and that there is a substantial likelihood that if the Internet content were to be classified by the Classification Board it would be classified “RC” or “X 18+”, the ACMA must give the Internet content host a written notice called an “interim take-down notice”.¹⁶⁹ This notice is to direct the Internet content host not to host the Internet content until the ACMA notifies the host of the Classification Board’s classification of the Internet content.¹⁷⁰ The ACMA must then request that the Classification Board classify the Internet content.¹⁷¹

¹⁶⁶ “Internet content host” is defined by clause 3 of Schedule 5 as “a person who hosts Internet content in Australia, or who proposes to host Internet content in Australia.”

¹⁶⁷ *Broadcasting Services Act*, Schedule 5, clause 30(1)

¹⁶⁸ A “final take down notice” is defined in clause 3 of Schedule 5 of the *Broadcasting Services Act* as “a notice under subclause 30(1) or paragraph 30(4)(b) of this Schedule.”

¹⁶⁹ “Interim take down notice” is defined in clause 3 of Schedule 5 of the *Broadcasting Services Act* as a notice under subparagraph 30(2)(a)(i) of this Schedule.”

¹⁷⁰ *Broadcasting Services Act*, Schedule 5, clause 30(2)(a)(i)

¹⁷¹ *Broadcasting Services Act*, Schedule 5, clause 30(2)(a)(ii)

The ACMA must provide the Classification Board with sufficient information to classify the Internet content or a copy of the content.¹⁷² The Classification Board must then classify the Internet content and provide written notice to the ACMA of the classification.¹⁷³ After the Classification Board provides written notice to the ACMA of its classification, the ACMA must then give the Internet content host a written notice setting out the classification¹⁷⁴ and if the Internet content is prohibited content, give the Internet content host a final take down notice.¹⁷⁵

If a final take down notice has been issued to an Internet content host in relation to Internet content that is classified R 18+ by the Classification Board and which is not subject to a restricted access system, the ACMA must revoke its final take down notice if the Internet content host satisfies the ACMA that they have implemented a restricted access system and as a result the content ceases to be prohibited content.¹⁷⁶ The ACMA must then give the Internet content host a written notice stating that the final take-down notice has been revoked.¹⁷⁷

Notices called “special take down notices” can also be issued by the ACMA if an interim take down notice or a final take down notice has been issued to an Internet content host.

¹⁷² *Broadcasting Services Act*, Schedule 5, clause 30(5)(a)

¹⁷³ *Broadcasting Services Act*, Schedule 5, clause 30(3)

¹⁷⁴ *Broadcasting Services Act*, Schedule 5, clause 30(4)(a)

¹⁷⁵ *Broadcasting Services Act*, Schedule 5, clause 30(4)(b)

¹⁷⁶ *Broadcasting Services Act*, Schedule 5, clause 32(1)

¹⁷⁷ *Broadcasting Services Act*, Schedule 5, clause 32(2)

These notices will be issued if the ACMA is satisfied that the Internet content host is hosting in Australia, or proposing to host in Australia, prohibited or potential prohibited Internet content that is the same as or substantially similar to, the Internet content identified in the interim take down notice or the final take down notice.¹⁷⁸ The special take-down notice is a notice not to host similar internet content at any time when the interim or final take down notice is in force.¹⁷⁹

An Internet content host must comply with an interim take down notice, at the latest, by 6pm on the next business day after the notice was given.¹⁸⁰ The same applies to a final take down notice¹⁸¹ and a special take down notice.¹⁸²

In summary, the Act empowers the ACMA to censor the internet by requiring internet content hosts to remove prohibited content so it cannot be viewed by internet users and consequently harm and corrupt society's moral fibre.

K. Revocation of take down notices

The Act provides that take-down notices should be revoked by the ACMA if the internet content is voluntarily withdrawn or reclassified.¹⁸³ So for example, if an interim take down

¹⁷⁸ *Broadcasting Services Act*, Schedule 5, clause 36

¹⁷⁹ *Ibid*

¹⁸⁰ *Broadcasting Services Act*, Schedule 5, clause 37(1)

¹⁸¹ *Broadcasting Services Act*, Schedule 5, clause 37(2)

¹⁸² *Broadcasting Services Act*, Schedule 5, clause 37(3)

notice has been issued and before classification of the content the Internet content host ceases to host the Internet content, the ACMA may, after receiving a written undertaking from the host not to host the content, revoke the interim take down notice.¹⁸⁴ Also, if after a reclassification of Internet content by the Classification Board, the Internet content ceases to be prohibited content, the ACMA must revoke a final take down notice.¹⁸⁵ The same applies if the internet content is a film or computer game which has been reclassified by the Classification Board.¹⁸⁶

L. *Prohibited content hosted outside Australia*

If, during an investigation, the ACMA is satisfied that Internet content hosted outside Australia is prohibited content or potential prohibited content, the ACMA must, if it considers the content to be of a sufficiently serious nature to warrant referral to a law enforcement agency in or outside Australia, notify the content to a member of an Australian police force.¹⁸⁷ This means that unless pornography was for example, child pornography and contrary to the criminal law, it is unlikely to be reported to police.

¹⁸³ *Broadcasting Services Act*, Schedule 5, clause 33, 34 and 35

¹⁸⁴ *Broadcasting Services Act*, Schedule 5, clause 33

¹⁸⁵ *Broadcasting Services Act*, Schedule 5, clause 34

¹⁸⁶ *Broadcasting Services Act*, Schedule 5, clause 35

¹⁸⁷ *Broadcasting Services Act*, Schedule 5, clause 40(1)(a)(i). Alternately, if there is an arrangement between the ACMA and the chief of an Australian police force under which the ACMA can notify another person or body, the ACMA can notify that other person or body (Schedule 5, clause 40(1)(a)(ii))

In addition to notifying a member of the Australian police force, the ACMA must also notify the internet service provider pursuant to the “designated notification scheme”¹⁸⁸ in the applicable code or standard. As mentioned above, there are three registered codes of practice available to the public via the ACMA web page. The applicable provision provides that such notification includes regular e-mail notification from the ACMA to Internet Service Providers and suppliers of family friendly filters of prohibited or potential prohibited content.¹⁸⁹

The ACMA must withdraw its notification to an internet service provider of prohibited or potential prohibited content if the internet content is reclassified by the Classification Board so that it ceases to be prohibited content.¹⁹⁰

¹⁸⁸ A “designated notification scheme” is defined in Schedule 5, clause 3 as a scheme for substituted service under which the ACMA is deemed to have given notice to an Internet Service Provider. It is also defined in clause 19.2 of the “Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992), 9 May 2002, version 10.4 (“the Code”) located at http://www.acma.gov.au/acmainterwr/aba/contentreg/codes/internet/documents/iaa_code.pdf accessed 19 July 2005 as a direct notification, by e-mail or otherwise by the ACMA to the Suppliers of IIA Family Friendly Filters of information by which the prohibited content or potential prohibited content can be identified, together with notification by e-mail by the ACMA to ISP’s on a regular basis of prohibited or potential prohibited content.

“Suppliers” are defined in clause 4.1 as “persons who develop, import, sell or distribute IIA Family Friendly Filters”, but excludes ISP’s who merely provide these filters in compliance with clause 19 of the Code. And who do not determine the content or operation of these filters.

“IIA Family Friendly Filter” is defined in clause 4.1 as “a filter that has met the criteria as set out in the Schedule to this Code and is listed on the IIA’s Safety Page.” The writer has looked at the IIA web page (19 July 2005) which does not contain any reference to family friendly filters. The Schedule also contains guidelines by no reference to specific filters. However, in the previous version of the Code (9 May 2002, version 7.2), examples of filters were provided including “Net Nanny” and “Cybersitter”.

¹⁸⁹ Clause 19.2 of the Code, located at Office of Film and Literature Classification web page, “National Classification Code” located at <http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf> accessed 19 July 2005:.

¹⁹⁰ *Broadcasting Services Act*, Schedule 5, clause 42 and 43

M. *Indemnities*

A person who makes a complaint in good faith is protected from civil proceedings in respect of loss, damage or injury of any kind suffered by another person because they have made a complaint¹⁹¹, made a statement or provided a document to the ACMA in connection with an investigation.¹⁹²

In addition, the Act protects internet service providers against civil proceedings in respect of anything done in compliance with a registered code or standard.¹⁹³ Also, civil proceedings do not lie against an Internet service provider for anything done to comply with a standard access prevention notice or a special access prevention notice.¹⁹⁴ Civil proceedings also do not lie against an Internet content host in respect of anything done by the Internet content host in complying with clause 37.¹⁹⁵ Clause 37 refers to compliance with rules relating to prohibited content such as an interim, final or special take down notices or an undertaking.

N. *A graduated scale of sanctions*

A person will be guilty of an offence if they engage in conduct that contravenes an online provider rule that is applicable to them.¹⁹⁶ “Online provider rules” include rules relating to

¹⁹¹ *Broadcasting Services Act*, Schedule 5, clause 29(a)

¹⁹² *Broadcasting Services Act*, Schedule 5, clause 29(b)

¹⁹³ *Broadcasting Services Act*, Schedule 5, clause 88(1)

¹⁹⁴ *Broadcasting Services Act*, Schedule 5, clause 88(2)

¹⁹⁵ *Broadcasting Services Act*, Schedule 5, clause 88(3)

prohibited content, compliance with access-prevention notices, industry codes and industry standards and online provider determinations.¹⁹⁷ The penalty is 50 penalty units, which is the equivalent of \$5,500.¹⁹⁸ So, for example, an internet content host commits an offence if they fail to remove internet content identified in a final take-down notice.

If an Internet service provider or an Internet content host has or is contravening an online provider rule, the ACMA may give the provider or host a written direction requiring them to take specified action to ensure there is no contravention in the future.¹⁹⁹ An example of the kind of direction that can be given to an Internet content provider or host includes a direction that the provider or host implement effective administrative systems for monitoring compliance with an online provider rule.²⁰⁰ Another example of the kind of direction that may be given by the ACMA to the provider or host, is that the provider or host implement a system so that their employees, agents or contractors have a reasonable knowledge or understanding of the requirements of the online provider rule, to the extent that they affect the employees, agents or contractors concerned.²⁰¹ A person will be guilty

¹⁹⁶ *Broadcasting Services Act*, Schedule 5, clause 82(1). “Engage in conduct” is defined as to “do an act” or to “omit to perform an act” (*Broadcasting Services Act*, Schedule 5, clause 82(2))

¹⁹⁷ *Broadcasting Services Act*, Schedule 5, clause 79

¹⁹⁸ *Broadcasting Services Act*, Schedule 5, clause 82(1). A “penalty unit” is defined in section 4AA of the *Crimes Act* as follows: “**penalty unit** means \$110.”

¹⁹⁹ *Broadcasting Services Act*, Schedule 5, clause 83(1) and (2)

²⁰⁰ *Broadcasting Services Act*, Schedule 5, clause 83(3)(a)

²⁰¹ *Broadcasting Services Act*, Schedule 5, clause 83(3)(b)

of an offence if they engage in conduct, (which includes an act or omission²⁰²), which contravenes a direction with a penalty of 50 penalty units.²⁰³

The ACMA may also issue a formal warning to a person who contravenes an online provider rule under clause 84. The ACMA may also apply to the Federal Court for an order that the person cease supplying the Internet carriage service or cease hosting that Internet content, if the ACMA is satisfied that a person who is an Internet service provider or an Internet content host is supplying an internet carriage service or hosting content in Australia otherwise than in accordance with an online provider rule.²⁰⁴

A person who does not comply with an online provider rule or who contravenes a direction from the ACMA, is guilty of a separate offence for each day the contravention continues.²⁰⁵

O. *Framework not applicable to private or restricted distribution communications*

The Act does not apply to e-mail communications or telecommunications such as the telephone. The aim of the Act is to monitor Internet content, which, as evidenced by the definition of “Internet content” in clause 3 which excludes “ordinary electronic mail” and “information that is transmitted in the form of a broadcasting service.” As mentioned in Senator Richard Alston’s Revised Explanatory Memorandum, “current provisions of the

²⁰² *Broadcasting Services Act*, Schedule 5, clause 83(5)

²⁰³ *Broadcasting Services Act*, Schedule 5, clause 83(4)

²⁰⁴ *Broadcasting Services Act*, Schedule 5, clause 85(1)

²⁰⁵ *Broadcasting Services Act*, Schedule 5, clause 86

Crimes Act 1914 (Cth) in relation to offensive or harassing use of a telecommunications service will apply in this context.”²⁰⁶

P. Community advisory body to monitor material

The third component of the legislation's scheme for monitoring Internet content is “a range of non-legislative initiatives directed towards monitoring content on the Internet and educating and advising the public about content on the Internet”.²⁰⁷

This monitoring role is undertaken by the ACMA as part of its additional functions. These include monitoring compliance with codes and standards registered under the Act²⁰⁸, to advise and assist parents in the supervision and control of children's access to Internet content²⁰⁹, to conduct and coordinate community education programs in connection with relevant consumer groups and government agencies²¹⁰, to conduct and commission research regarding issues relating to Internet content and Internet carriage services²¹¹, and to liaise with regulatory bodies overseas about cooperative arrangements to develop multilateral codes of practice and Internet content labelling technologies.²¹² The ACMA

²⁰⁶ Senator Richard Alston, *Revised Explanatory Memorandum*, Broadcasting Services Amendment (Online Services) Bill 1999, at <http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm> accessed 26/8/05. See note 3 above for an outline of the relevant provisions of the *Crimes Act*.

²⁰⁷ *Broadcasting Services Act*, Schedule 5, clause 1(4)

²⁰⁸ *Broadcasting Services Act*, Schedule 5, clause 94(a)

²⁰⁹ *Broadcasting Services Act*, Schedule 5, clause 94(b)

²¹⁰ *Broadcasting Services Act*, Schedule 5, clause 94(c)

²¹¹ *Broadcasting Services Act*, Schedule 5, clause 94(d)

²¹² *Broadcasting Services Act*, Schedule 5, clause 94(e)

also has the function of informing and advising the Minister on technological developments and service trends in the Internet industry.²¹³

Q. Commonwealth responsible for monitoring the activities of Internet service providers and internet content hosts

By amending the *Broadcasting Services Act* to include Schedule 5, the Commonwealth government, via the ACMA, is now responsible for monitoring and regulating the activities of Internet service providers and internet content hosts. As mentioned above²¹⁴, Senator Richard Alston's Revised Explanatory Memorandum states that the Attorney General will be responsible for encouraging uniform state and territory offence provisions that compliment the *Broadcasting Services Act*.

IV. CONCLUSION

In conclusion, although this chapter has gone through the Act in some detail, the crux of the legislative regime is to rely on members of the public, or the ACMA to find and report on internet content, such as pornography which they find to be offensive. The ACMA will then investigate the content, which is classified in accordance with the classification criteria for films, to determine whether to issue a take down notice to remove (and therefore censor) the material from the internet. If the internet content is hosted outside Australia, little can be done to remove it, other than informing the police and advising internet service providers so they can block access to the content. In summary, by attempting to safeguard

²¹³ *Broadcasting Services Act* 1992 (Cth), Schedule 5, clause 94(f)

²¹⁴ Senator Richard Alston, *Revised Explanatory Memorandum*, Broadcasting Services Amendment (Online Services) Bill 1999, at <http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm> accessed 26/8/05

society from moral harm, the Australian legislative regime has ignored the pornographic harms identified in chapter 1. This sentiment is summarised by Kendall who writes of the

Broadcasting Services Act:

“Because morality in our society has come to be linked with the community’s perception of decency and [sic] offensive and because inequality is unlikely to be seen as offensive to those for whom inequality is not a daily reality and for whom it is, in fact, sexually arousing – ie those men to whom we turn in determining what is in the public interest – any attempt to regulate pornography which uses concepts like immorality, indecency or impropriety as the basis for determining harm, will ultimately prove futile in protecting those who do not benefit from a community standard set by gender male privilege and who do not benefit from debates about morality which centre on little more than the proper boundaries of female objectification. The question that legislation of this sort poses is whether men are offended by what they see, rather than whether women are abused, violated and degraded as a consequence of the production and use of what these men see. By emphasising the corrupt effect of pornography on the consumer (usually male), laws of this sort ignore the fact that women are overwhelmingly pornography’s victims.”²¹⁵

The following chapter, chapter 4, will look at other approaches to regulation. It will examine the cases of *R v Butler*²¹⁶ and *Little Sisters Book and Art Emporium v Canada (Minister for Justice)*²¹⁷ in which the Supreme Court of Canada, through its interpretation of the criminal law, recognised that pornography contributed to maintaining gender inequality in society. However, the criminal law is still premised on morality and cannot empower victims by allowing them to seek compensation or injunctive relief like MacKinnon and Dworkin’s civil rights ordinance can. An examination of these cases will

²¹⁵ Kendall, C, “Australia’s New Internet Censorship Regime: Is This Progress?” (1999) 3 *Digital Technology Law Journal* at <http://www.law.murdoch.edu.au/dtlj/>. As mentioned in footnote 26 in the Introduction to this thesis, this entire electronic journal has been deleted from this web site and is consequently no longer accessible. I have obtained the author’s permission to cite this journal article.

²¹⁶ *R v Butler* (1992) 1 SCR 452 (Supreme Court of Canada) (“*R v Butler*”)

²¹⁷ *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120 (“*Little Sisters*”)

again highlight the need to reject “morality” while also stressing the need to take the power to stop pornography out of the hands of the police and into the hands of women.

Chapter 4 will further argue that Australia should enact MacKinnon and Dworkin's civil rights ordinance as a method of regulating pornography, including internet pornography, which is currently regulated under Schedule 5 of the *Broadcasting Services Act 1992* (Cth) using a censorship/ morality based approach. Although the ordinance is not currently a part of Australian legislation, the ordinance is the only means of regulation that recognises and addresses the harms of pornography identified in chapter 1 and empowers women to take action against their abusers and the distribution of their abuse as pornography.

CHAPTER 4

CRITIQUE OF MORALITY BASED APPROACHES TO REGULATING PORNOGRAPHY

I. INTRODUCTION

This chapter will illustrate why the morality based censorship approaches to regulating pornography, as outlined in the previous chapter, are inappropriate and ineffective to address the pornographic harms set out in chapter 1. The first part of this chapter will examine feminist critiques of morality as a means of regulating pornography, with particular reference to the work of MacKinnon and Dworkin.

Secondly, this chapter will outline the case of *R v Butler*¹ in which the Supreme Court of Canada, in its interpretation of the obscenity definition in the Canadian Criminal Code, recognised that pornography was harmful to women's equal participation in society because it contributes to and helps maintain systemic gender inequality. Overall, *Butler* is useful in that it goes some way toward rejecting the standard morality approach to regulation. Nonetheless, the court was still constrained by the criminal law (which has its basis in morality) and which leaves the power to regulate in the hands of customs officials and police. These problems are highlighted in the subsequent Canadian Supreme Court case of *Little Sisters Book and Art Emporium v Canada (Minister for Justice)*² which also affirmed the equality based approach taken by Butler in relation to same sex pornography.

¹ *R v Butler* (1992) 1 SCR 452 (Supreme Court of Canada) (“*Butler*”)

² *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120 (“*Little Sisters*”)

Thirdly, this chapter will examine MacKinnon and Dworkin's Civil Rights ordinance. Although the ordinance is not currently a part of any legislation, this thesis argues that the ordinance should be enacted as part of Australia's equal opportunity legislation because it is able to more effectively recognise and provide redress for pornographic harms. Furthermore, this thesis argues that the ordinance should be used, with modification, to regulate internet pornography, which is currently regulated under Schedule 5 of the *Broadcasting Services Act* using a censorship approach.

This chapter will end with a case study to illustrate how the ordinance would operate in practice. The basis for the case study is the case of *Horne & Anor v Press Clough Joint Venture & Anor*.³ In this case, pornography was used in a male dominated construction site to harass, demean and humiliate two women working on the site. The Western Australian Equal Opportunity Tribunal found the women's employer and trade union liable for sex discrimination and victimisation of the women. This case illustrates that a sex equality approach is an effective one. However, this case study will illustrate that the ordinance could have been used even further to empower these women.

II. CRITIQUE OF MORALITY

As has been illustrated in chapter 3, Australia's approach to regulating pornography, namely through the *Censorship Act*, *Classification Act* and *Broadcasting Services Act*, has morality as its foundation. Pornography is regulated through censorship and classification in order to protect the public and society from exposure to material that may cause moral harm.

³ *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556 ("Horne")

However, by focusing on preventing moral harm, these laws do nothing to protect or empower women to take action against the actual harms caused by the production and distribution of pornography.

Itzin discusses the origins and development of obscenity legislation as being “formulated in terms of morality and immorality.”⁴ Traditionally, the law of obscenity has suppressed obscene material which has the tendency of depraving or corrupting those likely to be exposed to it.⁵ In other words, the harm of material that is deemed to be obscene is the potential harm to the “moral fabric” of society.⁶ Itzin states: “Obscenity looks for evidence of harm to men or to morals, to see if men or the moral fabric of society is ‘depraved and corrupted’”.⁷ MacKinnon and Dworkin argue that obscenity and pornography are in fact two entirely different concepts. They argue that an approach which focuses on protecting society from moral harm fails to recognise the very real experiences of women who have been harmed by pornography. MacKinnon writes:

“Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is politics, specifically politics from women’s point of view meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. The two concepts represent two entirely different things.”⁸

⁴ Itzin, Catherine, “Legislating Against Pornography without Censorship” in Itzin, Catherine (ed) *Pornography: Women Violence and Civil Liberties* (New York: Oxford University Press, 1993), 401

⁵ Id, 402-403

⁶ Id, 403

⁷ Id, 411

⁸ MacKinnon, Catharine A, “Not a Moral Issue” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 170; See also MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 196 where she states:

Itzin also notes that obscenity fails to address pornography's real harm to women. She states that "obscenity legislation likes to pretend that harm is a matter of moral degradation and injury. For women, however, the harm of pornography is physical injury and social degradation in the form of sexual violence and subordination."⁹

As MacKinnon argues in the above quotation, obscenity deals with "morals from the male point of view." For something to be obscene, the "average person" must find that the material was obscene according to current community standards. These standards are determined by and for men within the context of patriarchy:

"Feminism doubts whether the average person, gender-neutral, exists; has more doubts about the content and process of definition of community standards than about deviations from them; wonders why purience counts but powerlessness doesn't; why sensibilities are better protected from offense than women are from exploitation; defines sexuality, hence its violation and expropriation, more broadly than does any state law and wonders why a body of law that can't in practice tell rape from intercourse should be entrusted with telling pornography from anything less."¹⁰

In addition, Dworkin notes that these male standards of obscenity are disproportionately applied to women. She notes that obscenity regards women's bodies as being more obscene as men's bodies: "Filth is where sexual organs are and because women are seen primarily as

"Obscenity law is concerned with morality, meaning good and evil, virtue and vice. The concerns of feminism with power and powerlessness are first political, not moral. From the feminist perspective, obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. Obscenity conveys moral condemnation as a predicate to legal condemnation. Pornography identifies a political practice that is predicated on power and powerlessness – a practice that is, in fact, legally protected. The two concepts represent two entirely different things."

⁹ Itzin, Catherine, "Legislating Against Pornography without Censorship" in Itzin, Catherine (ed) *Pornography: Women Violence and Civil Liberties* (New York: Oxford University Press, 1993), 413

¹⁰ MacKinnon, Catharine A, "Not a Moral Issue" in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 175

sex, existing to provide sex, women have to be covered: our naked bodies being obscene.”¹¹

Consequently, as MacKinnon notes, obscenity law simply reflects society’s construction of women as existing for men’s sexual gratification:

“In obscenity law, the state has been perfected as the mirror of society. In pornography, women are sex. In obscenity law, women are sex. In pornography, women’s bodies are dirty. In obscenity law, obscenity is filth. In pornography, the more explicit the sex, the more pornographic. In obscenity law, the more explicit the sex, the more obscene. In pornography, sex is a dirty secret. Obscenity law sees it, therefore helps keep it, that way. Pornography sees nothing wrong with what it does to women. Neither does obscenity law. Pornography is socially decried but socially permitted. Obscenity is the legal device through which it is legally repudiated but legally permitted.”¹²

In addition, obscenity is premised upon men’s reactions to it. As Dworkin notes, to be obscene, material must arouse what is known as the “purient interest”.¹³ Dworkin states that material that arouses the “purient interest” is material which causes men to have an erection.¹⁴ She writes:

“The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting-down of women, the suppression of women, and ultimately the brutalization of women, *is* what sex is taken to be. Obscenity in law, and in what it does socially, is erection. Law recognizes the act in this. Pornography, however, is a broader, more comprehensive act, because it crushes a whole class of people through violence and

¹¹ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 23

¹² MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 201

¹³ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 24

¹⁴ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 24. See also MacKinnon, Catharine A, “Not a Moral Issue” in in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 176 where she states, “To appeal to ‘purient interest’ means, I believe, to give a man an erection.”

subjugation: and sex is the vehicle that does the crushing. The penis is not the test, as it is in obscenity. Instead, the status of women is the issue.”¹⁵

In addition, obscenity is a shifting concept. As society becomes more desensitised to increasingly violent and degrading pornography, community standards become more “relaxed” resulting in less and less materials being deemed obscene. The standards of what is obscene and what is not become blurred. The result is that less and less material is regarded to be obscene and men are able to consume an increasing amount of violent and degrading pornography. Mackinnon states:

“The existing law against pornography was not designed to see harm to women in the first place. It is further weakened as pornography spreads, expanding into new markets (such as video and computers) and more legitimate forums and making abuse of women more and more invisible as abuse, as that abuse becomes more and more visible as sex. So the court becomes increasingly *unable to tell* what is pornography and what is not, a failing it laments not as a consequence of the saturation of society by pornography, but as a specifically judicial failure and, finally, as an area in which lines cannot be drawn.”¹⁶

Itzin further comments that obscenity laws allow pornographers themselves to determine the boundaries of obscenity law by increasing community standards of tolerance to more and more violent and degrading materials:

“In practice obscenity is overwhelmingly permitted. Obscenity law appears to be designed to have little effect on the sale of pornography and ‘even determined efforts’ by police ‘will not avail against the wiles of determined pornographers’. In spite of complaints about censorship, the pornography industry has in practice been at liberty to define the boundaries of obscenity law, in its terms going further and further in testing the ‘tolerance’ of the market-place and the judicial system, until that tolerance itself increases in response to the desensitizing properties of pornography.”¹⁷

¹⁵ Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 25

¹⁶ MacKinnon, Catharine A, *Only Words* (London: HarperCollins, 1995), 64

¹⁷ Itzin, Catherine, “Legislating Against Pornography without Censorship” in Itzin, Catherine (ed) *Pornography: Women Violence and Civil Liberties* (New York: Oxford University Press, 1993), 406

MacKinnon and Dworkin argue that to treat pornography as something obscene or indecent that must be censored from general public view fails to recognise, and does nothing to remedy, these very real harms. MacKinnon states:

“The law of obscenity, the state’s primary approach to its version of the pornography question, has literally nothing in common with this feminist critique. Their obscenity is not our pornography. One commentator has said, ‘Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community.’ Obscenity, at bottom, is not a crime. Obscenity is a sin. This is, on one level, literally accurate. Men are turned on by obscenity, including its suppression, the same way they are by sin. Animated by morality from the male standpoint, in which violation – of women and rules – is eroticized, obscenity law can be seen to proceed according to the interest of male power, robed in gender-neutral good and evil.”¹⁸

As noted by MacKinnon above, in addition to failing to address pornographic harms, a regulative approach based on obscenity encourages pornography to thrive by making it something prohibited and therefore appealing and sexy. In the words of MacKinnon:

“...the law of obscenity has the same surface theme and the same underlying theme as pornography itself. Superficially both involve morality: rules made and transgressed for purposes of sexual arousal. Actually, both are about power, about the equation between the erotic and the control of women by men: *women* made and transgressed for purposes of sexual arousal. It seems essential that the kick of pornography that it be to some degree against the rules, but never truly available or truly illegitimate. Thus obscenity law, like the law of rape, preserves the value of, without restricting the ability to get, that which it purports to both devalue and to prohibit. Obscenity law helps keep pornography sexy by putting state power – force,

¹⁸ MacKinnon, Catharine A, “Not a Moral Issue” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 173; See also MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 199, for a similar quotation:

“The law of obscenity has literally nothing in common with this feminist critique. Men’s obscenity is not women’s pornography. Obscenity is more concerned with whether men blush, pornography with whether women bleed – both producing a sexual rush. One commentator has said, ‘Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the ‘consumer’. Obscenity, at bottom, is not a crime. Obscenity is a sin.’ This is literally accurate. A sin is an idea that something is bad. Men are turned on by obscenity, including by its suppression, in the same way they are by sin. Animated by morality from the male standpoint, in which violation – of women and rules – is eroticized, obscenity law proceeds according to the interest of male power, robed in gender neutral good and evil.”

hierarchy – behind its purported prohibition on what men can have sexual access to.”¹⁹

In addition, a regulatory approach premised upon morality relies upon the discretion of police and customs officials to, at first instance, make a determination as to whether material is obscene. This is problematic because the majority of these officials are men who will apply their own prejudices, most often against women and sexual minorities, in determining obscenity.²⁰ If these men, which include not only customs officials and police, but also censorship boards and even judges, have the power to determine obscenity, feminist and gay and lesbian materials will often be suppressed as offending morality. For this reason, many feminists are opposed to regulating pornography through censorship, such as Valverde and Weir who state that:

“...censoring pornography is not an appropriate strategy for feminists, particularly lesbian feminists, to pursue. Legislation of this kind will only undermine our attempts to give birth to a lesbian culture. Under stricter pornography legislation, the sexist and anti-lesbian feature in *Penthouse* might be prohibited – but such tougher laws could be applied equally to lesbian sexual representation, written and visual. Even the current laws have been used against lesbians.”²¹

In addition, the discretion of these men does not guarantee that such materials will be prohibited. In the words of Dworkin: “obscenity laws, at the discretion of police and

¹⁹ MacKinnon, Catharine A, “Not a Moral Issue” in in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 184-185

²⁰ This will be discussed further below in the section on *Little Sisters*. In *Little Sisters*, the Canadian Supreme Court recognised that materials imported by Little Sisters bookstore were disproportionately targeted by Canadian customs officials who knew them to be destined for a gay and lesbian bookstore.

²¹ Valverde, Mariana and Weir, Lorna, “Thrills, Chills and the ‘Lesbian Threat’” in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985), 104

prosecutors, will keep obscenity out of the public view, but it remains available to men in private.”²²

Finally, as Dworkin notes, obscenity is an archaic concept that is now obsolete, and cannot keep up with advances in technology which expand the distribution of pornography even further:

The standards of obscenity law don't acknowledge the reality of the technology. They were drawn up in a society where obscenity was construed to be essentially writing and drawing; and now what we have is mass production in a way that real people are being hurt, and the consumption of real people by a real technology, and obscenity laws are not adequate to that reality.”²³

The Canadian Supreme Court, in the case of *Butler*, interpreted obscenity with reference to harm to women's equality within society, instead of harm to society's moral fabric. This was a significant departure from the traditional judicial interpretation of obscenity as a protection against moral harm. However, as will be pointed out, the court was still operating within the constraint of a morality based regulatory model. This is problematic, as became evident in the subsequent case of *Little Sisters*, which illustrates that empowering customs officials to make decisions about obscenity can result in the disproportionate and discriminatory targeting of materials destined for minority groups, whilst allowing harmful heterosexual pornography to enter the country unnoticed.²⁴

²² Dworkin, Andrea, “Pornography is a Civil Rights Issue for Women” (1987-1988) 21 *U. Mich. J.L. Reform* 55, 64

²³ *Ibid*

²⁴ For a discussion of the disproportionate targeting of materials destined for gay and lesbian bookstores by customs officials in *Little Sisters* see Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 170 – 181

III. R V BUTLER

The Canadian Supreme Court decision of *Butler* gave judicial recognition to pornographic harms. In particular, the court recognised that the production and distribution of pornography assists, maintains and contributes to systemic gender inequality and therefore women's unequal position in society. In *Butler*, the court departed from the traditional approach to obscenity as a safeguard against moral harm. Instead, the court recognised the actual harm to women's equality caused by pornography. Whilst this is a significant departure from the traditional morality based interpretation of obscenity, the court was still operating within the confines of the criminal law, which not only has its basis in morality, but which is policed primarily by male customs officials, police and eventually judges.

A. *The facts*

Donald Victor Butler was the owner of a store called the "Avenue Video Boutique" in Winnipeg, Manitoba which sold "hardcore" videotapes and magazines as well as sexual paraphernalia".²⁵ The store was raided by the City of Winnipeg Police on 21 August 1987 under the authority of a search warrant, with police seizing the store's inventory.²⁶ Butler was charged under the Canadian *Criminal Code* with 173 counts, including three counts of selling obscene material, 41 counts of possessing obscene material for the purpose of distribution, 128 counts of possessing obscene material for the purpose of sale and one count of exposing material to the public view.²⁷

²⁵ *Butler*, page 461 (Sopinka J)

²⁶ *Ibid*

²⁷ *Ibid*

Butler re-opened the store on 19 October 1987, and again, a search warrant was executed by police on 29 October 1987. At the time the search warrant was executed, an employee named Norma McCord was arrested, followed by Butler at a later date.²⁸ This time, a joint indictment was brought against Butler and McCord, this time containing 77 counts under the Canadian *Criminal Code*. The 77 counts included two counts of selling obscene material, 73 counts of possessing obscene material for the purpose of distribution, one count of possessing obscene material for the purpose of sale and one count of exposing obscene material to the public view.²⁹

At trial, Butler was convicted on 8 counts relating to 8 films and the Trial Judge imposed a fine of \$1,000 per offence. McCord was convicted of 2 counts relating to 2 films. Butler and McCord were acquitted of the 242 remaining charges, which the Crown appealed. Butler also cross appealed the convictions.³⁰

B. *Butler's appeal*

Butler appealed his convictions on the ground that the obscenity provisions of section 163 of the Canadian *Criminal Code*, under which he was convicted, were unconstitutional. Butler argued that section 163 of the Canadian *Criminal Code* contravened his freedom of speech and expression guaranteed by section 2(b) of the *Canadian Charter of Rights and*

²⁸ Ibid

²⁹ Id, 462

³⁰ Id, 462-3

Freedoms (“the Charter”). Section 2(b) provides that “Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression including freedom of the press and other media communication.” Section 2(b) of the *Charter* is read with section 1 which provides, “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Consequently, the issues before the court were whether section 163 of the *Criminal Code* violated section 2(b) of the *Charter* and if so, whether this violation was justified under section 1 of the *Charter*.³¹

C. *Obscenity precedent*

The court³², whilst acknowledging that the whole of section 163 was brought into question by these constitutional issues, confined its focus to section 163(8). This was because section 163(8) contained the definition of “obscenity” which was the primary focus of the parties’ submissions.³³ Section 163(8) is as follows: “For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and only one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.”³⁴

³¹ Id, 471

³² Sopinka J delivered the judgment on behalf of all of the Supreme Court Justices including Lamer CJ, La Forest, Cory, McLachlin, Stevenson and Iacobucci JJ.

³³ *Butler*, page 471 (Sopinka J)

³⁴ Id, 470-471

The court commenced its analysis by examining the legislative history and judicial interpretations of section 163(8) of the *Criminal Code* including the various tests used to interpret the provision.

The court's judgment began by outlining the legislative history of section 163. The Canadian Parliament's first attempt to legislate obscenity was section 179 of the *Criminal Code*.³⁵ This section was repealed in 1949 and replaced with section 207(1) which was substantially similar to section 168.³⁶ However, section 207(1) did not contain a definition of "obscene", "indecent" or "disgusting".³⁷ Consequently, the courts adopted the following definition of obscenity, formulated by Cockburn CJ: "...I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall".³⁸

In 1959 subsection (8) was added to section 163 which provided the statutory definition of "obscene".³⁹ The court then considered the case of *Brodie v The Queen*⁴⁰ which was the first

³⁵ Id, 471-472

³⁶ Id, 472-473

³⁷ Id, 473

³⁸ Cockburn J in *R v Hicklin* (1868) LR 3 QB 360 at 371 quoted in *Butler*, page, 473 (Sopinka J). This test is referred to as the "*Hicklin* test".

³⁹ *Butler*, 473-474 (Sopinka J)

⁴⁰ *Brodie v The Queen* [1962] S.C.R. 681 quoted in *Butler*, page 474 (Sopinka J)

case to consider the obscenity definition under the *Criminal Code*. The court in *Brodie* considered whether the novel, *Lady Chatterley's Lover*, written by D.H Lawrence was obscene. (It was held not to contravene the obscenity provisions of the *Criminal Code*.) The court discarded the *Hicklin* test⁴¹, and instead stated that the definition in section 163(8) “provided a clean slate and had the effect of bringing in an “objective standard of obscenity” which rendered all the jurisprudence under the *Hicklin* definition obsolete.”⁴² The court also cited *Dechow v The Queen*, in which Laskin CJ, at 962 stated that the test of obscenity in s163(8) was “an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic.”⁴³ The court also cited *Germain v The Queen*⁴⁴ as authority for the fact that section 168 provides an exhaustive definition of obscenity for the whole of section 168: “...it is now beyond dispute that s. 163(8) provides the exhaustive test of obscenity with respect to publications and objects which exploit sex as a dominant characteristic and that the common law test of obscenity found in the *Hicklin* decision is no longer applicable.”

The court in *Butler* then went on to examine 3 tests for determining what constitutes the “undue exploitation of sex”. That is, under section 163(8) of the *Criminal Code*, “in order for the work to qualify as ‘obscene’, the exploitation of sex must not only be its dominant characteristic, but such exploitation must be ‘undue’.”⁴⁵ The tests considered by the court

⁴¹ See above n 38

⁴² *Id*, page 474

⁴³ *Dechow v The Queen* [1978] 1 S.C.R. 951 (Laskin CJ at 962) quoted in *Butler*, page 474-475 (Sopinka J)

⁴⁴ *Germain v The Queen* [1985] 2 SCR 241 quoted in *Butler*, page 475 (Sopinka J)

⁴⁵ *Butler*, page 475-476 (Sopinka J)

were the “Community Standard of Tolerance Test”, the “Degradation or Dehumanization Test” and the “Internal Necessities Test” or “Artistic Defence.”

D. Community Standard of Tolerance Test

The court noted that this test was the “most important” in determining whether the exploitation of sex is undue.⁴⁶ The court commenced its discussion of this test by noting that in *Brodie*, Judson J followed the view of the Australian and New Zealand courts, in particular, Fullagar J in *R v Close*⁴⁷, that obscenity should be measured against “community standards”:

“There does exist in any community at all times – however the standard may vary from time to time – a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it...There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something that offends those standards.”

The court noted that the community standards test “is the standards of the community as a whole” and that the test must respond to changing times and ideas.⁴⁸ The court summarised the test as, “concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to.”⁴⁹ In

⁴⁶ Id, 475

⁴⁷ *R v Close* [1948] V.L.R 445, at 465 (Fullager J) quoted in *Butler*, page 476 (Sopinka J)

⁴⁸ *Butler*, page 476 (Sopinka J)

⁴⁹ Id, 478

addition, the court stated that this “tolerance level” should not vary depending on the audience and the manner of presentation of the material.

E. The Degradation or Dehumanization Test

The court noted that previous cases held that material showing sex in a degrading or dehumanising manner would fail the community standards test.⁵⁰ The court also noted that subsequent decisions, such as *R v Ramsingh*⁵¹ and *R v Wagner*⁵² held that material that degraded or dehumanised would offend community standards even without cruelty and violence.⁵³ The court quoted Ferg J in *R v Ramsingh* to describe the kind of material that would offend the community standards test, despite the absence of cruelty and violence:

“They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe that their raison d’être is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.”⁵⁴

The court expanded on this example to explain that this kind of pornography maintains women’s sexually subordinate position in society:

“Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation.

⁵⁰ Ibid

⁵¹ *R v Ramsingh* (1984) 14 C.C.C. (3d) 230 (Man. Q.B.) quoted in *Butler*, page 478 (Sopinka J)

⁵² *R v Wagner* (1985) 43 C.R. (3d) 318 (Alta. Q.B) quoted in *Butler*, page 478 (Sopinka J)

⁵³ *Butler*, page 478 (Sopinka J)

⁵⁴ *R v Ramsingh* (1984) 14 C.C.C. (3d) 230 (Man. Q.B.), page 239 (Ferg J) quoted in *Butler*, page 478-479 (Sopinka J)

They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing. This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanising sexual treatment results in harm, particularly to women and therefore to society as a whole...It would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material.”⁵⁵

The court also noted the decision of *Towne Cinema Theatres Ltd v The Queen*⁵⁶ in which Dickson C.J “considered the ‘degradation’ or ‘dehumanization’ test to be the principal indicator of ‘undueness’”.⁵⁷ The court quoted Dickson CJ who stated:

“...there is no necessary coincidence between the undueness of publications which degrade people by linking violence, cruelty or other forms of dehumanizing treatment with sex, and the community standard of tolerance. Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not ‘undue’ in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment.”⁵⁸

In relation to “undueness”, the court concluded that “the line between the mere portrayal of sex and the dehumanization of people is drawn by the “undueness” concept.”⁵⁹

⁵⁵ *Butler*, page 479-480 (Sopinka J)

⁵⁶ *Towne Cinema Theatres Ltd v The Queen* [1978] 1 S.C.R. 951 (“*Towne Cinema*”) quoted in *Butler*, page 480 (Sopinka J)

⁵⁷ *Butler*, page 480 (Sopinka J)

⁵⁸ *Id.*, 480-48

⁵⁹ *Id.*, 481

F. *Internal Necessities Test or Artistic Defence*

This test is the final test in deciding whether the exploitation of sex is “undue”.⁶⁰ Sopinka J noted the case of *Brodie v R* where Judson J set out the “internal necessities” test which:

“...recognises that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work, as the witnesses point out common sense indicates, must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.”⁶¹

The court summarised the test as follows:

“Accordingly, the “internal necessities” test, or what has been referred to as the “artistic defence”, has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or theme, and in considering the work as a whole, does not merely represent “dirt for dirt’s sake” but has a legitimate role when measured by the internal necessities of the work itself.”⁶²

G. *Which test?*

Following the court’s analysis of the three tests, the court considered which test to use and how the tests relate to each other. The court commented that judicial precedent was unclear as to which test was the more preferable.⁶³ In his judgment, Sopinka J joined the community standards test and the degrading and dehumanising test, with an emphasis on “harm” as follows:

“The courts must determine as best they can, what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debateable, the reverse. Anti-social conduct for this

⁶⁰ *Brodie v R* [1962] S.C.R. 681 (Judson J) quoted in *Butler*, page 482 (Sopinka J)

⁶¹ *Id.*, 481

⁶² *Id.*, 482-483

⁶³ *Id.*, 483

purpose is conduct which society formally recognises as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.”⁶⁴

The court concluded that “the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanising may be undue if the risk of harm is substantial.”⁶⁵

The court then considered how the “internal necessities” test related to these 2 tests.⁶⁶ They concluded that this test should be applied to a work that contained sexually explicit material which would by itself constitute the undue exploitation of sex. The sexually explicit material could then be viewed in the context of the work as a whole to determine whether it is the dominant theme of the work or whether it is “essential to a wider artistic, literary, or other similar purpose”.⁶⁷ The court went on to say that:

“The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.”⁶⁸

⁶⁴ Id, 485

⁶⁵ Id, 485

⁶⁶ Id, 486

⁶⁷ Id, 486

⁶⁸ Id, 486

H. Harms vs Freedom of expression

1 Did section 163 violate the Charter?

The court, in *Butler*, then went on to consider whether section 163 of the *Criminal Code* violated section 2(b) of the *Canadian Charter of Rights and Freedoms*.⁶⁹ The court noted that following the case of *Irwin Toy Ltd v Quebec (Attorney General)*⁷⁰, that the majority of the Court of Appeal had made an error in allowing an appeal, due to the erroneous application of the test in *Irwin Toy* that “some human activity is purely physical and does not convey or attempt to convey meaning” including the “materials in this case”.⁷¹ The court concluded that the pornography in question was physical but at the same time *did* convey meaning.⁷² The court concluded as follows:

“First, I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression. Second, in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression. The same would apply to the depiction of persons engaged in purely sexual activity.”⁷³

⁶⁹ Id, 486

⁷⁰ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 S.C.R. 951 quoted in *Butler*, page 48 (Sopinka J)

⁷¹ *Butler*, page 486-487 (Sopinka J)

⁷² Id, 487

⁷³ Id, 490

Consequently, the court concluded that section 163 violated section 2(b) of the *Charter*. This was because “...both the purpose and effect of s. 163 are specifically to restrict the communication of certain types of materials based on their content...” and “...to prohibit certain types of expressive activity.”⁷⁴

2 Was section 163 so vague that it was impossible to apply it?

The court then went on to consider whether section 163 “can be or have been given sensible meanings by the courts”⁷⁵ because the appellant, Butler, argued that section 163(8) was “so vague that it is impossible to apply it”.⁷⁶ The court concluded that “standards which escape precise technical definitions such as ‘undue’, are an inevitable part of the law”⁷⁷ and that other terms in the *Criminal Code* were not defined in the *Criminal Code* but were able to be judicially interpreted.⁷⁸

3 Does potential harm outweigh freedom of expression?

The Crown argued that “there are several pressing and substantial objectives which justify overriding the freedom to distribute obscene materials.”⁷⁹ These included “the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes

⁷⁴ Id, 489

⁷⁵ Id, 491

⁷⁶ Id, 490

⁷⁷ Id, 491

⁷⁸ Id, 490

⁷⁹ Id, 491

and the public interest in maintaining a ‘decent society’.”⁸⁰ However the appellant, Butler, argued that “the objective of s163 is to have the State act as ‘moral custodian’ in sexual matters and to impose subjective standards of morality.”⁸¹ The court rejected this latter argument in favour of a harms based perspective: “In my view, however, the overriding objective of section 163 is not moral disapprobation but the avoidance of harm to society.”⁸²

The court did, however, recognise the interconnection between morality and harms:

“...the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s.163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole.”⁸³

The court went on to comment that the purpose of the legislation was “the protection of society from harms caused by the exposure to obscene materials.”⁸⁴ The court further stated that:

“This court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of freedom of expression. In my view, the harm sought to be avoided in the case of dissemination of obscene materials is similar...there is a growing concern that the exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to ‘abject and servile victimization’...if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual

⁸⁰ Id, 491

⁸¹ Id, 491-492

⁸² Id, 493

⁸³ Id, 494

⁸⁴ Id, 495

exploitation and abuse have a negative impact on ‘the individual’s sense of self worth and acceptance.’”⁸⁵

The court also quoted Dickson J.A in *R v Prairie Schooner News Ltd* who stated that:

“The *Canadian Bill of Rights* was intended to protect, and does protect, basic freedoms of vital importance to all Canadians. It does not serve as a shield behind which obscene matter can be disseminated without concern for criminal consequences. The interdiction of the publications which are the subject of the present charges in no way trenches upon the freedom of expression which the *Canadian Bill of Rights* assures.”⁸⁶

Significantly, the court found that “...the objective of avoiding harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression.”⁸⁷ In addition, the court found that the message of inequality portrayed by pornography is analogous to hate propaganda⁸⁸ and that after considering social science evidence, that there was a “causal relationship between obscenity and the risk of harm to society at large” and that “the relationship between pornography and harm was sufficient to justify Parliament’s intervention”.⁸⁹ The court referred to the *Meese Commission Report* in support of the fact that although a direct causal relationship between pornography and harm is difficult to prove, it is reasonable to assume that exposure to pornography has a causal connection to changes in attitudes and beliefs:

⁸⁵ Id, 496-497

⁸⁶ *R v Prairie Schooner News Ltd* (1970) 75 WWR 585 at 604 (Dickson JA) quoted in *Butler*, page 498 (Sopinka J)

⁸⁷ *Butler*, page 498 (Sopinka J)

⁸⁸ Id, 501

⁸⁹ Id, 501

“...the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence. Although we rely for this conclusion on significant scientific evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bear a causal relationship to their behaviour. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behaviour, especially in a form that almost exclusively portrays such behaviour as desirable, did not have at least some effect on patterns of behaviour.”⁹⁰

The Court also considered the argument of the interveners that “less intrusive measures” which would counter pornographic harms could be taken by Parliament (rather than the criminal prohibition in section 163) in order to allow freedom of expression through the production and distribution of pornography.⁹¹ These measures included counselling women to report rape and sexual assaults, providing shelter for battered women, education about sex discrimination and education for government agencies and authorities. The court dismissed these arguments by stating that:

“...many of the above suggested alternatives are in the form of responses to the harm engendered by negative attitudes against women. The role of the impugned provision is to control the dissemination of the very images that contribute to such attitudes. Moreover, it is true that there are additional measures which could alleviate the problem of violence against women. However, given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives that have been suggested.”⁹²

⁹⁰ *Attorney General’s Commission on Pornography Final Report* (U.S., 1986), vol 1, page 326 (“*Meese Commission Report*”) quoted in *Butler*, page 502 (Sopinka J)

⁹¹ *Butler*, page 507 (Sopinka J)

⁹² *Id.*, 508

The final question considered by the court was whether the objective of the legislation, being the avoidance of harm, was outweighed by the need to maintain the fundamental right of freedom of expression. The court concluded that the legislative restriction of pornography of a violent, degrading or dehumanising nature, was a justifiable restriction on freedom of expression, and in fact, questioned whether there was any restriction on freedom of expression at all:

“The infringement on freedom of expression is confined to a measure designed to prohibit the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing. As I have already concluded, this kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.”

In summary, the Canadian Supreme Court in *Butler* rejected the idea that pornography is morally harmful, and instead recognised that pornography is harmful to women’s equality and equal participation in society. Whilst the court’s approach was a progressive one, the court was confined by having to interpret the definition of obscenity in the Criminal Code which has its foundations in morality. In addition, although the court held that obscenity should be determined with reference to harm, such a determination was required to be made at first instance by police and customs officials. As has been mentioned above, this can result in certain materials, such as feminist or gay and lesbian materials being disproportionately targeted. This was in issue in the case of *Little Sisters*.

IV. LITTLE SISTERS BOOK AND ART EMPORIUM V CANADA (MINISTER FOR JUSTICE)

In *Little Sisters* the Canadian Supreme Court, following *Butler*, recognised that lesbian and gay pornography, as well as heterosexual pornography can be harmful and consequently,

that it should not be an exception to the harms based test of obscenity in *Butler*. *Little Sisters*, whilst adopting *Butler's* harms based interpretation of obscenity, highlights the inequalities that can result from police and customs officials making the initial determination of obscenity, often resulting in materials destined for minority groups being unfairly targeted.

A. *The facts*

The appellant in this case was Little Sisters Book and Art Emporium (“Little Sisters”), a corporation who owned a book store of the same name in Vancouver, Canada.⁹³ The book store was a specialty book store, as opposed to an adult store⁹⁴ who described its business in its amended statement of claim as “...the sale of books and magazines most of which are written by and for homosexual men and women...”⁹⁵ The store’s inventory more specifically included, “gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe sex advisory material and gay and lesbian erotica.”⁹⁶

Since its establishment in 1983, Little Sisters experienced ongoing difficulties in importing books and magazines from the United States because, pursuant to Customs Legislation, Canadian Customs would often delay, seize or order shipments of books and magazines to

⁹³ *Little Sisters*, at 1136 (Binnie J) and at 1206 (Iacobucci J)

⁹⁴ *Little Sisters* at 1135 (Binnie J). Note that Binnie J delivered the joint judgment of McLachlin C.J, L’Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ.

⁹⁵ *Little Sisters* at 1206 (Iacobucci J)

⁹⁶ *Little Sisters* at 1135 (Binnie J)

be returned to sender.⁹⁷ This caused Little Sisters financial hardship because its overseas suppliers would often require payment within 30 days, even though goods could be held up at customs for months or returned to sender. This resulted in some suppliers refusing to make further shipments of goods to Little Sisters.⁹⁸ In addition, the delays due to items being stopped and seized by Canadian Customs resulted in delayed book launches, loss of business to competitors who were able to import the items, and the loss of the shelf value of items such as magazines whose value depended on their currency.⁹⁹

Customs officials gave evidence of the vast number of imports that came through the Customs Mail Center each year, which totalled approximately 10.5 million.¹⁰⁰ Despite this high volume of imported items, and despite evidence being given that Canadian Customs had restricted resources¹⁰¹, further evidence suggested that Little Sisters and other comparative bookstores had been disproportionately targeted by Canadian Customs.¹⁰² This had resulted in “works by internationally acclaimed authors” and “AIDS/HIV safe-sex education literature” being classified by Customs as prohibited.¹⁰³

⁹⁷ Id, 1136 – 1137 (Binnie J)

⁹⁸ Id, 1136 - 1137 (Binnie J)

⁹⁹ Id, 1139 – 1140 (Binnie J)

¹⁰⁰ Id, 1141 (Binnie J)

¹⁰¹ Id, 1138 (Binnie J)

¹⁰² Id, 1139 (Binnie J)

¹⁰³ Id, 1139 (Binnie J)

B. *The legislation in question*

Little Sisters argued that the Customs legislation was unconstitutional because it contravened sections 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms* (“the Charter”). Section 2(b) of the Charter states that, “Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹⁰⁴ Section 15(1) provides that:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹⁰⁵

However, section 1 of the Charter provides that the Charter “...guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁰⁶ The Customs legislation which was in question was firstly section 114 of the *Customs Tariff* which said that “The importation into Canada of any goods enumerated or referred to in Schedule VII is prohibited.”¹⁰⁷ The prohibited items in Schedule VII included, “Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that...are deemed to be obscene under subsection 163(8) of the Criminal Code.”¹⁰⁸ Section 163(8) of the Canadian Criminal Code provides that “...any publication a dominant characteristic of

¹⁰⁴ *Canadian Charter of Rights and Freedoms* (“Charter”) quoted in *Little Sisters* at 1144 (Binnie J)

¹⁰⁵ *The Charter* quoted in *Little Sisters* at 1144 (Binnie J)

¹⁰⁶ *The Charter* quoted in *Little Sisters* at 1144 (Binnie J)

¹⁰⁷ *Customs Tariff*, R.S.C., 1985, c. 41 (3rd Supp.) (“*Customs Tariff*”) quoted in *Little Sisters* at 1145 (Binnie J)

¹⁰⁸ *Customs Tariff* quoted in *Little Sisters* at 1145 - 1146 (Binnie J)

which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.”¹⁰⁹

The Customs Act, in particular section 99, “authorizes Customs officers to examine imported goods and mail and to open packages that they reasonably suspect may contain goods referred to in the Customs Tariff...”¹¹⁰ Customs can also determine “the appropriate tariff classification”¹¹¹ including whether an item is “obscene” and therefore prohibited.¹¹²

C. *The issues before the court*

The issues that the Canadian Supreme Court considered in *Little Sisters* were whether these sections of the *Customs Act* and *Customs Tariff* infringed section 2(b) of the *Charter*, and if so, whether the infringement was justified by section 1 of the *Charter*. In addition, the Court considered whether the *Customs Act* and *Customs Tariff* infringed section 15(1) of the *Charter* in their application to gay and lesbian books and magazines, and if so, whether the infringement was justified by section 1 of the *Charter*.

In considering Little Sisters’ challenge to the *Customs Act* and the *Tariff Act*, the court was required to consider a number of arguments as to why *Butler’s* harms-based interpretation of section 163(8) of the *Criminal Code* should not apply to gay and lesbian “publications”.¹¹³

Central to Little Sisters’ argument was the assertion that:

¹⁰⁹ *Criminal Code R.S.C.*, 1985, c. C-46 (“*Criminal Code*”) quoted in *Little Sisters* at 1147 (Binnie J)

¹¹⁰ *Little Sisters*, page 1143 (Binnie J)

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ *Id*, 1154 – 1155 (Binnie J)

“...homosexual erotica plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream. Erotica provides a positive representation of what it means to be gay or lesbian. As such, it is argued that sexual speech in the context of gay and lesbian culture is a core value and *Butler* cannot legitimately be applied to locate it at the fringes of s. 2(b) expression. Erotica, they contend, plays a different role in a gay and lesbian community than it does in a heterosexual community, and the *Butler* approach based, they say, on heterosexual norms, is oblivious to this fact. Gays and lesbians are defined by their sexuality and are therefore disproportionately vulnerable to sexual censorship.”¹¹⁴

D. Arguments raised by Little Sisters to distinguish *Butler*

The court then addressed five main arguments raised by Little Sisters to argue that gay and lesbian publications should be exempted from the interpretation of section 163(8) of the *Criminal Code* by the Supreme Court in *Butler*.

Firstly, Little Sisters argued that the *Butler* test for obscenity, in considering what would be tolerated by the broader community, creates prejudice against “non-mainstream, minority representations of sex and sexuality”.¹¹⁵ They argued that the broader community were more likely to “view gay and lesbian imagery as degrading and dehumanizing”.¹¹⁶ However, the court rejected this argument, stating that the “national community standard relates to harm not taste”¹¹⁷ and that “*Butler* placed harmful expression – not sexual expression – at the margin of s. 2(b)”.¹¹⁸

¹¹⁴ Id, 1155 (Binnie J)

¹¹⁵ Id, 1159 (Binnie J)

¹¹⁶ Id, 1159 – 1160 (Binnie J)

¹¹⁷ Id, 1162 (Binnie J)

¹¹⁸ Id, 1162 (Binnie J)

Little Sisters then argued that the “degrading or dehumanizing test is open to homophobic prejudice”¹¹⁹ because it was “highly subjective”¹²⁰ and by its nature encouraged customs to prohibit certain materials. However, the court also rejected this argument, stating that *Butler* qualified the words, “degrading or dehumanizing” by the addition of the words, “if the risk of harm is substantial”.¹²¹ In addition, the court recognised that same-sex pornography could be equally as harmful as heterosexual pornography if the message is inequality, stating that:

“This makes it clear that not all sexually explicit erotica depicting adults engaged in conduct which is considered to be degrading or dehumanizing is obscene. The material must also create a substantial risk of harm which exceeds the community’s tolerance. The potential of harm and a same sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable”.¹²²

Thirdly, Little Sisters argued that the harms-based approach applied in *Butler* was “merely morality in disguise”¹²³, however this argument was also rejected by the court who stated that “...the community standard of tolerance is based on the reasonable apprehension of harm, not on morality”.¹²⁴

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² *Little Sisters*, at 1162 - 1163 (Binnie J)

¹²³ Id, 1163 (Binnie J)

¹²⁴ Ibid

Fourthly, Little Sisters argued that *Butler* primarily involved videos and should therefore be distinguished from Little Sisters' case which primarily involved written texts and magazines.¹²⁵ However, the court was of the opinion that there was nothing in the majority judgments in *Butler* to suggest that *Butler* did not apply to written texts, stating that "*Butler*'s concern was not with the medium but with the message."¹²⁶ The court did however note that it would be more difficult to establish that a book was obscene than a video but commented that this fact was favourable to Little Sisters' case.¹²⁷

Finally, Little Sisters' argued that the decision in *Butler* did not apply to gay and lesbian erotica; rather it only dealt with pornography "aimed at a heterosexual male audience."¹²⁸ However the court rejected the argument that there should be a "special exception for gay and lesbian erotica" because the harm-based approach to obscenity adopted by the court in *Butler* was applicable to all kinds of pornography, regardless of the kind of pornography or the target audience.

In summary, the court's opinion of Little Sisters' attack on the decision in *Butler* was as follows:

"My conclusion on the first branch of the appellant's attack is that the *Butler* analysis does not discriminate against the gay and lesbian community. *Butler* is directed to the prevention of harm, and is indifferent to whether such harm arises in the context of heterosexuality or homosexuality. Nor in my view is the gay and lesbian community discriminated against in the Customs legislation, which is quite

¹²⁵ Id, 1164 (Binnie J)

¹²⁶ Id, 1164 - 1165 (Binnie J)

¹²⁷ Id, 1165 (Binnie J)

¹²⁸ Id, 1165 (Binnie J)

capable of being administered in a manner that respects *Charter* rights. The government is entitled to impose border inspections of expressive material. The obstacles experienced by the appellants and detailed at length by the trial judge were not inherent in the statutory scheme.”¹²⁹

E. Arguments raised by Little Sisters to challenge the validity of Customs legislation

Little Sisters raised numerous arguments to challenge the constitutional validity of the Customs legislation. They argued that when Parliament enacted the Customs legislation, it should have been more detailed regarding the specific procedures and avenues of appeal to be followed by Customs officers.¹³⁰ However, the court found that Parliament was validly able to legislate to prevent certain “expressive material” from entering into the country that was obscene under the criminal law.¹³¹ The court found that it was not the legislation that was defective, but rather the way in which Customs officers had administered the legislation.¹³² The court also found that the delays that importers faced whilst waiting for an appeal about a publication that had been classified as obscene were primarily due to Customs officers and the Customs department not being able to comply with the statutory time limitations and not the legislation itself.¹³³

However, the court agreed with Little Sisters in relation to the “reverse onus” provision in section 152(3) of the *Customs Act*. This provision provided that if a Customs officer

¹²⁹ Id, 1155 (Binnie J)

¹³⁰ Id, 1167 - 1168 (Binnie J)

¹³¹ Id, 1170 (Binnie J)

¹³² Id, 1170 (Binnie J)

¹³³ Id, 1174 -1177 (Binnie J)

deemed imported material to be obscene, the importer had the burden of proving that the material imported was not obscene (as opposed to the Crown having the burden of proving that the material was obscene).¹³⁴ The court found that the reverse onus provision contravened the importer's constitutional right to freedom of expression:

“...the provision cannot constitutionally apply to put on the importer the onus of disproving obscenity. Otherwise entry of expressive materials could be denied by reason of the onus even where the standard of obscenity is not met, as for example, where an importer lacks the resources or the stamina to contest an initial determination. An importer has a Charter right to receive expressive material unless the state can justify its denial. It is not open to the state to put the onus on an individual to show why he or she should be allowed to exercise a Charter right.”¹³⁵

Little Sisters also argued that in addition to the legislation inhibiting freedom of expression, it also discriminated against the gay and lesbian community because it disproportionately affected the gay and lesbian community.¹³⁶ The court noted that imported materials destined for gay and lesbian bookstores “were subjected to delays and seizures that were not only unjustified but disproportional”.¹³⁷ However, the court concluded that this discrimination was not due to the legislation but to Customs officials:

“...there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity, as already discussed, operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the Customs legislation.”

¹³⁴ Id, 1177 - 1178 (Binnie J)

¹³⁵ Id, 1179 (Binnie J)

¹³⁶ Id, 1182 (Binnie J)

¹³⁷ Id, 1184 (Binnie J)

F. *The outcome*

In summary the court found that the Customs legislation did infringe the constitutional right to freedom of expression in section 2(b) of the Charter.¹³⁸ However, they found that this infringement was justified by section 1 of the Charter.¹³⁹ This was with the exception of the reverse onus provision which was found to be unconstitutional.¹⁴⁰ The court also found that Little Sister's rights were not disproportionately discriminated against by the Customs legislation and therefore did not violate section 15(1) of the Charter.¹⁴¹

Little Sisters is significant because it recognises that same sex pornography can be harmful in its presentation of gendered hierarchical representations of inequality. The court recognised that these representations, instead of being liberating and affirming for gay men and lesbian women, actually promote the homophobia and inequality that some argue they subvert. Again, of significance is the fact that the court was operating within the realm of Customs legislation, which again has its foundations in obscenity and therefore morality. So although the court was able to affirm the harms based equality approach to obscenity in *Butler*, the power to determine obscenity still initially rests with customs officials. The problems with this approach are evident. As Kendall notes:

“...in *Little Sisters*, the Supreme Court of Canada held that the *Butler* equality-based test applies to gay and lesbian pornography and that the harms of gay pornography do not cease to exist simply because the materials pair biological equals or are used by an oppressed sexual minority. The Court also recognized, however, that Canada Customs’

¹³⁸ Id, 1205 (Binnie J)

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Id, 1205 - 1206 (Binnie J)

procedures regarding the seizure and detention of pornography have been arbitrary and, as such, have discriminated against lesbians and gay men. It was also revealed in the course of this litigation that Canada Customs had failed to effectively implement the equality-based approach to pornographic harm outlined by the Canadian Supreme Court in *Butler*. Indeed, despite the minor changes already made to Customs procedures in an effort to rectify some its past wrongs, one is left to query whether non-harmful same-sex materials will not continue to be stopped at the border, while harmful heterosexual pornography *is* allowed to enter and be sold.”¹⁴²

So, how do we ensure that what must be stopped is stopped? The MacKinnon anti-pornography ordinance does much in this regard because it enables women to decide whether to pursue action against the makers and distributors of pornography and takes the discretion to do so out of the hands of the state.

V. THE ORDINANCE

This chapter will now examine the civil rights ordinance drafted by Law Professor Catharine MacKinnon and feminist writer Andrea Dworkin. It will begin by outlining the background to the ordinance, followed by an analysis of each section of it. This thesis will argue that the ordinance should be enacted into Australian law because it is the only method of regulation that recognises the harms identified in chapter 1. In addition, the ordinance empowers women to take direct action against those who have harmed them instead of relying on state institutions such as the police. The ordinance has been reproduced in the Appendix to this thesis, Appendix A.

¹⁴² Kendall, Christopher N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 163

A. Background

In 1983, Catherine MacKinnon and Andrea Dworkin were approached by residents of two working class areas of Minneapolis, in the United States, to help them draft a zoning ordinance to stop the distribution of pornography in their neighbourhoods. When MacKinnon and Dworkin were first approached, they were asked to draft a zoning ordinance which would only permit pornography to be sold in other specified low income neighbourhoods.¹⁴³ However, MacKinnon and Dworkin suggested that instead of drafting a zoning ordinance, the ordinance should adopt a sex equality approach. According to MacKinnon and Dworkin, restricting the sale of pornography to certain areas would continue to legitimise pornography, whereas a sex equality approach would recognise the harms of pornography and would allow victims of pornography to obtain redress for those harms. A civil rights ordinance, as opposed to a zoning ordinance, would allow the victims of pornography to sue the makers and distributors of that pornography, to obtain injunctions to stop the sale and distribution of pornography made of them and damages.¹⁴⁴

The ordinance was the first attempt to regulate pornography as an issue of sex inequality.¹⁴⁵

The Minneapolis ordinance was enacted but was vetoed by the Mayor, Donald M. Fraser.¹⁴⁶

¹⁴³ See generally MacKinnon, Catharine A. & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997). See also Kendall, Christopher, N., *Gay Male Pornography: An Issue of Sex Discrimination* (Canada: UBC Press, 2004), 183 – 184 for a summary of the history of the Ordinance.

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Ibid

In 1984, Indianapolis passed a similar ordinance as legislation.¹⁴⁷ The Indianapolis ordinance was later challenged and held to be unconstitutional because it was a violation of the right to freedom of speech, guaranteed by the American Constitution.¹⁴⁸ As we do not have such constitutional limitations in Australia, the ordinance could be incorporated as an amendment to Australian equal opportunity legislation.

B. Outline of Sections of the Ordinance

Section 1, clause 1 of the ordinance recognises pornography as “a practice of sex discrimination” which has the effect of “threatening the health, safety, peace, welfare, and equality of citizens in our community.” This is an important statement about what the ordinance is and does. The ordinance provides a means of recognising the harms caused by pornography, including maintaining systemic gender inequality and also including more specific harms to women who are forced to perform in pornography or who are sexually assaulted due to pornography.

Section 1, clause 2, contains more detail about what pornography is and does – something that regulatory approaches premised upon morality do not. It identifies pornography as “a systemic practice of exploitation and subordination based on sex that differentially harms and disadvantages women.” It also lists, in some detail, the harms of pornography. These include physical harm such as rape and sexual abuse, as well as psychological harms such as

¹⁴⁷ Ibid

¹⁴⁸ *American Booksellers Association v Hadnut* 771 F.2d 323 (7th Cir. 1985) in MacKinnon, Catharine A. & Dworkin, Andrea *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 462 - 482

“psychic assault”. The harms are also listed to include lessening women’s ability to participate in society as equal citizens by diminishing “opportunities for equal rights in employment, education, property, public accommodations and public services” and exposing those forced to perform in pornography to “contempt, ridicule, hatred, humiliation and embarrassment”.

Section 2, clause 1 contains a detailed definition of pornography which defines pornography as “the sexually explicit subordination of women through pictures and/or words” which includes one or more of the characteristics listed in sub-paragraphs a. through to h. Although the definition of pornography in Section 2, clause 1 specifically refers to women, clause 2 provides that “the use of men, children, or transsexuals in the place of women...is also pornography...”

Section 3 outlines causes of action that a “person”¹⁴⁹ can take pursuant to the ordinance. Section 3, clause 1, named “coercion into pornography” provides that “it is sex discrimination to coerce, intimidate, or fraudulently induce...any person into performing for pornography”. Section 3, clause 1 also provides that damages and injunctions can be sought against the “maker(s), seller(s), exhibitor(s) and/or distributor(s)” of that pornography. The fact that the “person is a woman”, “is or has been a prostitute” (and numerous other factors are listed in Section 3, clause 1 from sub-paragraphs a. through to m.) do not prevent a finding of coercion.

¹⁴⁹ “Person” is defined in Section 2, clause 3 of the ordinance to “include child or transsexual” as well as a woman.

Section 3, clause 2 makes it “sex discrimination to force pornography on a person in any place of employment, education, home or any public place.” Section 3, clause 3 provides that “it is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography.” It is also “sex discrimination to defame any person through the unauthorized use of pornography of their proper name, image, and/or recognizable personal likeness.” Section 3, clause 5 provides that “it is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs” but (in sub-paragraph a.) exempts public and university libraries “in which pornography is available for study”.

The defences available under the ordinance are set out in section 4. Clause 1 of section 4 provides that ignorance of the fact that materials are pornography or sex discrimination is no defence. Clause 2 of section 4 provides that no damages or compensation can be recovered under section 3, clause 5 (trafficking in pornography) “unless the defendant knew or had reason to know that the materials were pornography”. Similarly, if there is an assault or physical attack against a person due to pornography, actionable under section 3, clause 3, damages or compensation can only be sought against the “perpetrator of the assault or the attack” “unless the defendant knew or had reason to know that the materials were pornography”. In addition, section 4, clause 3 provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5 of the ordinance contains the enforcement provisions. Section 5, clause 1, provides that if a person has a cause of action under the ordinance, they can seek relief in a civil court. This is a recognition of pornography as a civil rights violation against women and not an issue of morality. Section 5, clause 2(a) provides that if a person has a cause of action they can seek (or their estate can seek) “nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorneys’ fees and costs of investigation”. Section 5, clause 2(b) provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5, clause 3 permits a person who has a cause of action under the ordinance to apply for injunctive relief. However, under section 5, clause 3(a), a “temporary or permanent injunction” cannot be issued prior to a court deciding that the “challenged activities” contravene the ordinance. In addition, under section 5, clause 3(b), the injunction is limited to the pornography described in the order of the court and must not “extend beyond” the pornography specified in the order. Finally, section 5, clause 5 provides that if a person obtains legal relief under the ordinance they are not precluded from seeking any other form of civil or criminal relief.

In order to demonstrate how the ordinance empowers women to take action against pornography, the case of *Horne* will now be examined in detail. This case will be used to illustrate how a sex discrimination approach to pornography is a beneficial one. *Horne* will

also be used to illustrate how the ordinance can go significantly further than Australia's current equal opportunity laws in empowering women harmed by pornography.

C. Case study: *Horne & Anor v Press Clough Joint Venture & Anor*

*Horne*¹⁵⁰ is a decision of the Western Australian Equal Opportunity Commission which found in favour of two women employed as cleaners on a male dominated construction site. The case recognised that the prolific display of pornography in the women's workplace amounted to sex discrimination and victimisation by the women's employer and trade union. The case is an example of how a sex discrimination approach is an effective one in such a situation, whereas a morality based censorship approach would have done nothing to help these women. However, the women could have been assisted and empowered even further by the MacKinnon/ Dworkin civil rights ordinance.

The two women (the complainants) were cleaners and the only female employees on a construction site.¹⁵¹ In several of the rooms that the women were required to clean, there were posters and pictures of naked and semi-naked women, described in the judgment as "soft porn".¹⁵² The complainants felt uncomfortable with these pictures but tolerated them as "incidental to their work" on a male dominated construction site.¹⁵³

¹⁵⁰ *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556 ("*Horne*")

¹⁵¹ The facts are set out on pages 77,057 – 77, 059 of the judgment

¹⁵² *Horne* at 77,057

¹⁵³ *Ibid*

One day, the second complainant went into the site supervisor's office to clean it and "was confronted by a totally explicit poster of a nude woman."¹⁵⁴ She complained to the site supervisor but instead of the poster being removed a sticker was placed over the genitals of the woman in the pornography.

Later on, a pornographic poster showing a man and a woman "engaged in a sexual act"¹⁵⁵ was displayed on a wall of another of the rooms that one of the complainants had to clean. After "an angry confrontation with the owner of the poster"¹⁵⁶, it was removed. From this time, the number of pornographic posters being displayed around the construction site increased. Several weeks later, the complainants found that one of the crib huts that they were required to clean had "particularly offensive posters on the walls."¹⁵⁷

The complainants spoke to the site organiser of their union, the Metals and Engineering Workers' Union ("MEWU"), Mr D, about these "particularly offensive posters". The complainants took these posters down after Mr D agreed that they could remove them. The response that the complainants received from the other male workers on the construction site to taking down the posters was an extremely angry one.¹⁵⁸ Mr D then asked the complainants to speak to him in his office, telling them, "that it was very unfortunate they had taken the attitude they had towards the posters and that if they maintained that position,

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Ibid

it would make them very unpopular on site.”¹⁵⁹ The women were told by Mr D that their actions could cause the men to go on strike, that they did not have the support of the MEWU and that there was a “computer blacklist” on which the complainants may find themselves listed as troublemakers. The complainants felt intimidated, threatened and that they had no support from their union.¹⁶⁰

Later on, the complainants were confronted by some of the men who demanded they return the posters. When the complainants tried to explain why the posters were offensive to them they were told, “it was a male workplace and that the women had no right to bring a woman’s perspective into it.”¹⁶¹ The judgment then explains that: “The men said they were lucky to have their jobs and if they wanted to work in a male environment they would just have to ‘cop it’”.¹⁶²

After this, more posters, which were more and more explicit and offensive to the women, began to be displayed around the workplace. A group of Christian male workers, who were also upset by the posters started to take some of the posters down, however the women were thought to be the culprits and were subjected to “more abuse.”¹⁶³

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Id, 77,057-77,058

¹⁶² Id, 77,058

¹⁶³ Id, 77,058

The first complainant then attended a training course in Perth and spoke to the State Secretary, Mr F, of the MEWU about the posters. She asked the union to intervene and suggested that the shop stewards and union officials should attend equal opportunity courses as they appeared not to be aware of their responsibilities under the equal opportunity legislation. Mr F refused, saying that “he could not force people to undergo equal opportunity courses if they did not want to.”¹⁶⁴

Approximately a month later, the second complainant entered a crib hut and was confronted by “a number of pornographic and sexually explicit posters displayed on the wall, including pictures of women masturbating”.¹⁶⁵ She approached the Health and Safety Representative and Assistant Shop Steward, Mr R, and told him she wanted the posters removed. Mr R agreed to do something although “he would not be very popular with the men.”¹⁶⁶ Instead of the posters being removed, “a curtain of rubbish bags was placed over the display, with a note saying it was to protect the ‘virginal morality’ of the second complainant”.¹⁶⁷ The judgment goes on to state that: “There was also a note pinned to the wall to the effect that if the complainants did not like it they should get out; that they were working in a male environment; that they were holding jobs that should have gone to men and generally containing personal abuse directed to them.”¹⁶⁸

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Ibid

When the second complainant told the first complainant about this incident, the first complainant approached the MEWU shop steward, and later five MEWU health and safety representatives, but the posters were still not removed. The next morning the first complainant went to the MEWU office and told Mr D and others in the office “that it was about time they ‘got their act together and started acting like a union.’”¹⁶⁹

The offensive posters were taken down, but not the note. When the first complainant told the foreman that she feared a “backlash” from the male workers, asking what could be done to prevent it, the foreman said nothing could be done and that he was leaving the note in place because it was “fair comment”.¹⁷⁰ The first complainant also went to see the Industrial Relations and Personnel Manager who would not take any action because the posters had been removed.

The judgment states that the number of posters started to increase, as did their “hard-core” content and as a consequence:

“The complainants’ relationship with the male workforce deteriorated even further. They were subjected to more personal abuse and offensive remarks. They felt threatened and intimidated.”¹⁷¹

Several weeks later several incidents occurred that were intended to intimidate the women. Firstly, the first complainant entered a hut to clean and was “confronted by a full length female nude poster which had been used for dart practice, and had also been violently

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Ibid

stabbed through the heart, head and genitals.” It was reported that the first complainant felt “very frightened and distressed by this.”¹⁷² Secondly, when the second complainant went into the site office of the union to clean it, she saw “a very explicit poster of a naked woman” above the MEWU Convenor’s desk and felt that the union was condoning the material and “attacking” her with the material instead of representing her interests.¹⁷³ She took this poster down, and spoke to the Trade Union Training Authority to obtain information about equal opportunity courses. She gave this information to the Assistant Secretary of the MEWU but never heard from him again. Thirdly, the second complainant went to clean a new crib hut, “she saw that all four walls and the ceiling were covered with hard-core pornographic material.”¹⁷⁴

Fourthly, two weeks later the men had Christmas drinks the day before the Christmas holidays during which there was a lot of “horseplay”. The first complainant heard one of the men yell, “Get Heather” and she ran to the storeroom to hide. The first complainant’s supervisor told the men to leave her alone, and she later became aware that her supervisor had been “attacked.” She was also told: “you should see what they had planned for you.”¹⁷⁵

The first complainant made a final attempt to do something about the pornography by organising a meeting with the personnel manager but afterwards was approached and

¹⁷² Ibid

¹⁷³ Id, 77,059

¹⁷⁴ Ibid

¹⁷⁵ Ibid

intimidated by two MEWU shop stewards. She then had an accident at work and did not return to the workplace. The judgment stated that prior to her accident:

“...she had been so stressed by the situation at work that she became ill. As she recovered from her injury she said the prospect of having to return to the site became increasingly distressing. She suffered a mental and emotional decline and eventually could not cope with the prospect of returning at all.”¹⁷⁶

The second complainant went on annual leave but on her return was still subjected to abuse. She was told there was “graffiti drawings of an offensive and disgusting nature of her and the first complainant in the male toilets”.¹⁷⁷ She took photos at night of this graffiti and upon seeing the photos developed she was “physically ill, frightened and disgusted” causing her to leave her job.¹⁷⁸

The complainants’ claim was based on section 160 of the *Equal Opportunity Act 1984* (WA). Their complaint was that the MEWU “through its employees or agents, caused, instructed, induced, aided or permitted the employer [Press Clough Joint Venture] to discriminate against them on the ground of their sex.” The complainants argued that MEWU did this in two ways.¹⁷⁹ Firstly, by its employees and agents failing and refusing to support them in having the pornography removed from the workplace. Secondly, the women argued that MEWU’s employees or agents were responsible for the display of a pornographic poster in the union site office. The complainants also claimed victimisation

¹⁷⁶ Ibid

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Id, 77,062

under section 67 and 161 of the *Equal Opportunity Act 1984* (WA). The Tribunal held on behalf of the complainants on both grounds.

In the subsequent reported decision of *Horne & Anor v Press Clough Joint Venture & Anor*¹⁸⁰, delivered on 21 April 1994, the Equal Opportunity Tribunal considered the women's case against their employer, Press Clough Joint Venture. The complainants alleged that the presence of pornography in their workplace amounted to sex discrimination, that their employer knew of the presence of the posters and was therefore directly liable under the Act, that their employer was liable for victimisation and that their employer had failed to take reasonable steps to prevent the discrimination and victimisation. The Tribunal found in favour of the women against their employer. The women were awarded damages of \$92,000.

D. Application of the Ordinance to Horne

This chapter will now expand upon how the ordinance could have further assisted and empowered the women in *Horne*. Notably, the ordinance goes further than Australian equal opportunity legislation by specifically identifying pornography as sex discrimination which contributes to women's unequal position in society.¹⁸¹ Recognition of this by the law is vital in educating and gradually changing attitudes about what pornography is and does.

¹⁸⁰ *Horne v Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-591

¹⁸¹ Ordinance, Section 1, "Statement of Policy"

Firstly, the pornography that the women were subjected to in their workplace would satisfy the definition of pornography in Section 2 of the ordinance. The judgment avoids describing the pornography in detail with the exception of “a poster depicting a man and a woman engaged in a sexual act”¹⁸²; “pictures of women masturbating”¹⁸³; “a full length female nude poster which had been used for dart practice, and had also been violently stabbed several times through her heart, head and genitals”¹⁸⁴; and “graffiti drawings of an offensive and disgusting nature of her [the second complainant] and the first complainant in the male toilets”¹⁸⁵. These would constitute pornography under several parts of the definition of pornography in the ordinance. These are: clause a. “women are presented dehumanized as sexual objects, things or commodities”; clause d. “women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt”; and clause e. “women are presented in postures or positions of sexual submission, servility or display”. The judgment’s reference to the pornography as “sexually explicit”, “offensive” and “hard core pornography”, whilst having their basis in morality, should not be unfairly criticised because it is the language used by the women to attempt to describe the pornography they were subjected to. There is no doubt that the pornography went way beyond offending the women’s moral sensibilities; it made the women feel “intimidated and threatened”¹⁸⁶; “very frightened and distressed”; and “physically ill, frightened and disgusted”¹⁸⁷, causing the first

¹⁸² *Horne*, at 77,057

¹⁸³ *Horne*, at 77,058

¹⁸⁴ *Ibid*

¹⁸⁵ *Id*, 77,059

¹⁸⁶ *Horne*, at 77,057

¹⁸⁷ *Id*, 77,059

complainant to have a mental breakdown and both women to be too afraid to return to work. In addition, the second complainant, on being confronted with an “explicit poster of a naked woman” in the union site office felt that the union was “‘attacking’ her with this material.”¹⁸⁸

The women in *Horne* would also have several specific causes of action under the ordinance, which more specifically address their experiences, instead of simply confining them to sexual harassment and victimisation. Significantly, the women would have a claim under section 3, clause 2 of the ordinance. This clause makes it “sex discrimination to force pornography on a person in any place of employment, education, home or in any public place.” The women clearly had pornography repeatedly forced upon them in their workplace to such an extent that they could not do their cleaning jobs without being confronted with it. Of benefit to the women in *Horne* is the second sentence of this clause which states: “Complaints may be brought only against the perpetrator of the force and/or the entity or institution responsible for the force.” This means that under the ordinance the women could have sued the individual men in their workplace who were responsible for forcing the pornography on them as well as their employer and union. This is illustrative of the educational and deterrent effect of the ordinance. In other words, the prospect of a direct prosecution may have fostered some feelings of individual responsibility in the women’s male co-workers to remove the pornography after the women complained, or not to put it up in the first place.

¹⁸⁸ Ibid

As mentioned above, the second complainant was told that there were “graffiti drawings of an offensive and disgusting nature of her and the first complainant in the male toilets”¹⁸⁹. The judgment states that the second complainant “went into the male toilets at night and took photos of the graffiti, which when she saw them developed, made her feel physically ill, frightened and disgusted.”¹⁹⁰ The judgment does not contain specific details of the graffiti; however, such graffiti could constitute defamation through pornography pursuant to section 3, clause 4 which states that: “It is sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image, and/or recognizable personal likeness.” As the graffiti was of the two women, probably to discredit or damage their credibility due to their complaints about the pornography, and probably in a sexual context, the graffiti would be likely to contravene this clause.

In addition, the women would also have a cause of action against section 3 of clause 5 of the ordinance, named “trafficking in pornography.” This clause states that: “It is sex discrimination to produce, sell, exhibit, or distribute pornography”. The women in *Horne* would have a claim not only for the exhibition of pornography in their workplace, but also for the distribution of pornography by their male co-workers.

Pursuant to the ordinance, the women in *Horne* would be able to initiate civil proceedings themselves in a court of law.¹⁹¹ The women could have applied for injunctive relief under

¹⁸⁹ Id, 77,059

¹⁹⁰ Ibid

¹⁹¹ Ordinance, section 5, clause 1

section 5, clause 3 of the ordinance, but only after a final determination is made by the court that the ordinance has been violated. What would have been more beneficial is if the women could have obtained an interim injunction which would take effect until the matter could have been finally determined by the court. However, a permanent injunction could be sought by the women to restrain their union and employer from displaying pornography in the workplace indefinitely.

In addition, the women could apply for “nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as reasonable costs including attorney’s fees and costs of investigation.”¹⁹² This scope for awarding damages and costs is somewhat broader than the costs awarded to the women in *Horne*. In *Horne*, the women were each awarded \$12,000 for “humiliation, nervous and emotional distress, embarrassment, hurt feelings and fear” they experienced in their workplace for over twelve months.¹⁹³ The women also felt that they could not continue in a similar kind of employment in a male dominated workplace and were each awarded \$4,000 for “loss of amenity and lost opportunity.”¹⁹⁴ The women were also awarded \$25,000 and \$35,000 respectively for lost wages, resulting in the first complainant being awarded \$41,000 and the second complainant being awarded \$51,000. The scope of the damages provisions in the ordinance indicates that the women could have received additional compensation, particularly in the form of punitive damages in order to financially

¹⁹² Ordinance, section 5, clause 2a

¹⁹³ *Horne*, at 77,179

¹⁹⁴ *Horne*, at 77,180

punish the individual men, union and employer responsible for their harassment and victimisation.

Finally, the women would be able to pursue other relevant civil or criminal relief under section 5, clause 5 of the ordinance, such as a claim in negligence against their employer and union for failing to provide a safe workplace, free from harassment.

E. *Application of the Ordinance to the Internet*

MacKinnon and Dworkin first formulated the ordinance as a means of regulating pornography as an issue of sex discrimination in 1983.¹⁹⁵ There have been notable technological developments since this time, including the development and prolific expansion of the internet and the World Wide Web. This has allowed pornography to develop and to be distributed like never before and to be easily, readily available in the home, often free of charge. It has also permitted more and more men to become pornographers, and to make pornography of women as part of their domestic abuse. As a result, the message of sexual inequality is being extensively distributed and promoted.

Consequently, the significant question is whether the ordinance is sufficient to deal with these advances in technology and the inequality that they promote. The ordinance's recognition of pornography as a practice of sex discrimination which maintains gender inequality and "harms and disadvantages women" in section 1 is unchanged by

¹⁹⁵ MacKinnon, Catharine A & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 4

technological advances such as the internet. Arguably these definitions of what pornography is and does are even more relevant because the internet facilitates the mass distribution of inequality like never before.

In addition, as evidenced by chapter 2 which outlined the types of pornography available via the internet, the definitions of pornography in section 2 remain applicable. In fact, they accurately describe and define much of the pornography available via the internet. As illustrated in chapter 2, there is a proliferation of violent and degrading material available via the internet which is accurately defined by the definition of pornography in section 2.

Equally, the causes of action in section 3 of the ordinance are equally applicable to the internet. For example, the internet allows anyone with a digital camera and internet access to become a pornographer and to post pornography on an internet web page. Consequently, section 3, clause 1, “coercion into pornography” is applicable to women being coerced or forced into having pornography made of them in their own homes. Also, section 3, clause 2 “forcing pornography on a person” could include pornography forced upon a person by e-mail or by being forced to view pornography via the internet. Section 3, clause 3, “assault or physical attack due to pornography” is particularly relevant where the internet is concerned because the internet allows for the mass dissemination of pornography and information about how to rape, hurt and abuse women, making the risk of physical attack due to pornography a greater risk than ever before.

The internet also dramatically increases the breadth of publication of defamatory pornography. It provides a means to defame a person on a world wide level. Therefore section 3, clause 4, “Defamation through pornography” is also relevant to the internet. Section 3, clause 5, “Trafficking in Pornography” is also applicable to the internet as a means of producing, selling, exhibiting and distributing pornography.

Given the nature of the internet as a means of mass communication of pornography and inequality, the ordinance is more applicable and relevant than ever before. However, the global nature of the internet raises jurisdictional problems of who and where to sue. For example, if pornography is made in the United States, posted on the internet through a server provided by an internet service provider in Singapore, and is viewed in Australia where a woman is harmed as a result of the pornography, does an Australia court have the jurisdiction to determine liability under the ordinance?

The Australian courts’ approach to internet defamation provides some guidance in this regard. In particular, the principles regarding the publication of internet defamation from case of *Dow Jones & Company Inc v Gutnick*¹⁹⁶ can be applied to resolve the issue of whether the Australian courts have jurisdiction to apply the ordinance to pornography originating from outside Australia.

Joseph Gutnick was a business person, living and conducting a business from Victoria, Australia. Gutnick also conducted business in several other countries including the United States of America. Gutnick commenced legal proceedings in Victoria, Australia, against

¹⁹⁶ *Dow Jones & Company Inc v Gutnick* (2000) 210 CLR 575 (“Gutnick”)

Dow Jones & Company Inc (Dow Jones), a publishing company based in the United States who published the *Wall Street Journal* newspaper and a magazine called *Barron's*. Gutnick alleged that an article called “Unholy Gains” published by Dow Jones in one of its magazines named “Barron's”, which contained several references to him, defamed him. As well as being available in printed magazine form, the magazine was also available online to readers who paid an annual fee to access it via the Wall Street Journal web site. The writ was served on Dow Jones in the United States.¹⁹⁷

The central issue before the High Court of Australia was where the alleged defamatory material was published. Dow Jones argued that the Australian courts had no jurisdiction to determine the matter. This was because, they argued, the proper jurisdiction was in New Jersey in the United States where the article was published by being uploaded onto servers. They also argued that if the Australian courts had jurisdiction, so too would other courts around the world, resulting in a potential indeterminate amount of legal proceedings against a publisher for the one article. Gutnick argued that the Australian courts did have jurisdiction because the article was published in Victoria, the place where it was read. Gutnick argued that the High Court should simply extend the traditional law of defamation, which provided that the publication occurs where the material is read, to the internet.

The High Court accepted Gutnick's argument and held that it did have jurisdiction to hear the matter because the place of publication was the place in which the internet defamation was read. The majority of the High Court stated:

¹⁹⁷ The facts of *Gutnick* can be found at page 576 - 585

“...Mr Gutnick has sought to confine his claim in the Supreme Court of Victoria to the damage he alleges was caused to his reputation *in Victoria* as a consequence of the publication that occurred *in that State*. The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers. It is his reputation in *that State*, and only that state, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick’s claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction.”¹⁹⁸

Gutnick provides a useful point of reference in terms of the jurisdiction of the Australian courts to apply the ordinance to pornography published via the internet. Applying *Gutnick*, if internet pornography is viewed in Australia, and that pornography causes harm; for example, if that pornography is forced on a person, inspires an assault or physical attack, or constitutes defamation; it would be actionable in the Australian courts under the ordinance. Clause 5 of section 3 of the ordinance regarding “trafficking in pornography” would also apply to pornography produced, sold, exhibited and distributed via the internet.

A further question that needs to be considered in a discussion of the application of the internet to the ordinance is whether the scope of defendants can extend to internet service providers. There are a number of arguments that have been raised against Internet Service Providers (“ISP’s”) having to be liable for content they host. One argument is that ISP’s should not have the burden of inspecting all of the content they host, which for some ISP’s could result in having to inspect “hundreds of thousands of online messages every day.”¹⁹⁹

¹⁹⁸ *Gutnick*, page 608, per Gleeson CJ, McHugh, Gummow and Hayne JJ. Gaudron, Kirby and Callinan JJ were also in the majority, however gave separate judgments.

¹⁹⁹ Hamilton, Robert W, “1998 Symposium: Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet” 8 *Seton Hall Const. L.J.* 733 at 739

In addition, once an ISP has inspected content, they may then have to exercise “editorial judgment”, including judgment as to whether content is lawful or not.²⁰⁰ It has been argued that this will result in ISP’s having to divert their resources away from their main purpose, which is to host internet content, and will force ISP’s to acquire new skills such as “the ability to review content”, resulting in administrative burdens and increased costs.²⁰¹ However, surely ISP’s, as facilitators for the mass dissemination and distribution of pornography and sexual inequality, should be required to take some responsibility for the content that they host? Arguably ISP’s are the modern day distributors and exhibitors of pornography – an important role in the prolific distribution of pornography that is contemplated under the ordinance. If it was not for ISP’s, pornography would not be able to be distributed via the internet at all. In addition, ISP’s may argue that the application of liability under the ordinance would create financial hardship, but this is simply the same argument that pornographers would raise about the applicability of the ordinance to them and this is the very point of the ordinance – to hit the pornographers where it hurts - financially. For women to achieve true empowerment pursuant to the ordinance, and for the ordinance to achieve a true educative effect in the modern world, the ordinance must be amended to apply to ISP’s.

VI. CONCLUSION

In summary, a criminal law approach to regulating pornography is a problematic one for two reasons. Firstly, a criminal law approach has its basis in morality (obscenity), which is

²⁰⁰ Ibid

²⁰¹ Scott, Brendan, “Silver Bullets and Golden Egged Geese: A Cold Look at Internet Censorship” 23(1) *UNSW Law Journal* 215, 217

premised upon mens' reactions and perceptions of women's bodies as dirty, and needing to be censored from public view in case the images deprave or corrupt the viewer. This perception not only makes pornography more taboo, and consequently more appealing for its consumers, but it also completely fails to recognise and address the harms that result to real women in the making of pornography, and as a result of the consumption of pornography.

Secondly, as *Butler* and *Little Sisters* illustrate, even when the courts apply equality theory to an interpretation of the criminal law, they are still leaving the decisions as to what is "offensive" in the hands of police and customs officials who will apply their own biases and prejudices to their decisions. This was particularly problematic in the case of *Little Sisters* where materials destined for gay and lesbian bookstores were disproportionately targeted, no doubt allowing harmful heterosexual pornography to enter the country undetected. So whilst the Canadian Supreme Court was able to apply an equality based approach to interpreting the obscenity provisions of the *Criminal Code*, they were still constrained by morality.

The case of *Horne* illustrates that an equality based approach does work and can empower individual women to take action against pornographic harms, instead of relying on others to take the action for them. The women in *Horne* could be further empowered by the ordinance which not only specifically addresses and recognises what happened to them, but also offers a wider range of remedies such as damages against those individuals who

victimised and harassed them, and damages against the makers and distributors of the pornography as well as their employers.

In addition, as well as applying to workplace harassment and intimidation, the ordinance empowers women to take action in a variety of situations, such as where pornography has a role in sexual abuse and rape, or where women are coerced into pornography. The ordinance provides injunctive relief and empowers women to sue and obtain injunctive relief against not only their abusers, but also the makers and distributors of pornography.

Consequently, Australia must adopt the sex equality approach proposed by the ordinance. The ordinance is the only method of regulation that addresses the harms of pornography and which empowers women to take direct action themselves without having to rely on patriarchal institutions such as police, customs officials, judges and censorship boards to take action for them. In the words of Dworkin:

“This law educates. It also allows women to do something. In hurting the pornography back, we gain ground in making equality more likely, more possible – some day it will be real. We have a means to fight the pornographers trade in women. We have a means to get at the torture and the terror. We have a means with which to challenge the pornography’s efficacy in making exploitation and inferiority the bedrock of women’s social status. The civil rights law introduces into the public consciousness an analysis: of what pornography is, what sexual subordination is, what equality might be...The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility.”²⁰²

²⁰² Dworkin, Andrea, “Against the Male Flood: Censorship, Pornography and Equality” in Cornell, Drucilla (ed) *Feminism and Pornography* (New York: Oxford University Press, 2000), 38

CONCLUSION

This thesis has illustrated that Australia's censorship laws, in particular censorship legislation such as the *Broadcasting Services Act*, do not effectively regulate pornography on the internet because they are based on the principle that the harm of pornography is its effect on society's moral fibre. MacKinnon and Dworkin's civil rights ordinance should be urgently enacted into Australian law because it is the only regulatory model that adequately addresses the harms to sexual equality caused by the production and distribution of pornography.

Chapter 1 of this thesis illustrated "what pornography really is"¹ and does. Chapter 1 illustrated that pornography is not just a harmless image on a page, film or computer screen. It is a record of the abuse of a real woman, made for the entertainment and sexual gratification of men.

Pornography ruins real women's lives, and it does so on three main levels. Firstly, real people are used in pornography, and although they are often described as "actors", what is happening to them is very real. It was evident from the testimonies of women at the civil rights hearings, that women's "choice" to enter the pornography industry is often not a free one. Many women enter the industry as children, often at the hands of abusive family members. As adults, many women enter the industry as part of being pimped out by male

¹ Testimony of Cheryl Champion, Minneapolis Press Conference, quoted in MacKinnon, Catharine A & Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997), 262

relatives or friends. This is evident from the “ordeal” of Linda Marchiano who was pimped out and forced to perform in pornography by her husband.

We have also seen that even if women make a “free choice” to enter the pornography industry their “choice” is often made under false impressions about what the industry has to offer them such as fame, glamour, money and flexibility. Some women think that a career in pornography may lead to a legitimate acting career in film or television. However, the reality of working in the pornography industry soon dispels these myths. Once they are working in the industry, women are exposed to sexually transmitted diseases, such as HIV infection, due to the industry’s disdain for safe sexual practices. Women, such as Annabel Chong and Linda Marchiano are often not paid, or are poorly paid for their “performances” in pornography. Most cannot make the transition to a “legitimate” acting career because they are tainted from working in the pornography industry.

Secondly, chapter 1 highlighted the harms that can result to non-“actors” from the production and consumption of pornography. Many women testified at the Minneapolis civil rights hearings into pornographic harm about the role that pornography played in their rape and sexual abuse. For these women, there was simply no doubt whatsoever that pornography played a causal role in their abuse by family members, and also by strangers. Many women testified about how pornography was used as a manual, or text book for their abuse and of how they were made to do the acts seen in pornography as part of their abuse within the home. Women were also assaulted and raped by strangers who were acting out what they had seen in pornography. Testimony was also given as to how pornography,

prominently displayed in male dominated workplaces was used to intimidate and victimize women working in these male dominated environments. This was also the experience of the women in the case of *Horne* where pornography was prolifically displayed throughout a male dominated construction site where the women were working as cleaners.

Pro-pornography activists argue that the testimonies of these women are insufficient to illustrate that there is a correlation between pornography and harm. However, there are numerous studies, such as the studies undertaken by Malamuth, Check, Guloien, Zillman, Bryant, Linz, Donnerstein and Penrod, which show that pornography increases men's sexual callousness towards women, reinforces rape myths, increases men's desire to rape and to continue to consume increasingly violent pornography. Russell also presents a logical and well argued model, based on this research of how exposure to pornography is a cause of rape. More importantly perhaps, real women have now testified to these harms. Their voices matter and offer the proof that those who aim to silence them are too quick to reject.

The third harm of pornography, identified by MacKinnon and Dworkin, and outlined in chapter 1, is that pornography is a principal means of maintaining gender inequality in society by sexualizing women's unequal position in society. MacKinnon and Dworkin argue that pornography does this by showing men as dominant, and women as submissive objects who enjoy being raped, humiliated and degraded to satisfy male sexual pleasure. The false perception that women enjoy this abuse creates the belief in the viewer that such hierarchies represent the natural and normal order of things. MacKinnon and Dworkin

argue that pornography sexualises this inequality, which the viewer carries through into his social context. As a result, society's perception of women is that they are inferior to men and should be denied the right to be able to participate equally in society. As a result, women are discriminated against on many levels, such as in pay, employment and education.

Chapter 2 contains a detailed discussion of the types of pornography that are readily available online. The internet is readily accessible in homes and businesses and pornography on the internet is prolific. The far reaching nature of the internet allows the harms of pornography to pervade women's homes and workplaces like never before. The message of pornography, namely inequality, is distributed on a mass scale. In fact, some joke that the only reason some people look at the internet is to view pornography. The nature of the internet also makes it difficult to restrict access to pornography, with internet content filters only having limited success in blocking children's access to pornography.

The Australia Institute Reports, in particular the first AI Report, detail a large proportion of pornography that is available via the internet. Many of the categories of pornography identified by the first AI Report centered on women's bodies and body parts, or rather what was being done to them. Women were put in stereotypical roles such as "models", "porn stars", "whores", and "hookers". The first AI Report also identified that much of this pornography is violent and degrading, often premised upon force, rape or lack of consent, including web sites dedicated to rape, bestiality, incest and voyeurism. This chapter also examined two recent developments in internet pornography: "feeders" and "women and

machines”. The web sites devoted to “feeders” are extreme examples of power and powerlessness where a man literally feeds a woman to make her so obese that her health is in serious danger and she cannot move, wash or care for herself without the assistance of her male abuser, who she is completely dependent upon for survival. This chapter also examined web sites devoted to women and machines in which women are raped by large machines made of industrial and commercial machinery. These machines have the ability to cause extreme internal harm to the women and are extreme examples of degradation and humiliation of women for the purpose of the male viewer’s sexual pleasure. What is equally as worrying is that these machines can be purchased for use in the home.

Australia’s approach to regulating pornography, namely a morality based censorship approach, was outlined in chapter 3. From a review of Australia’s censorship legislation, such as the *Censorship Act* and the *Classification Act*, it is evident that such an approach does nothing to address any of the harms of pornography identified in chapter 1. A censorship approach is premised upon what a reasonable man finds offensive in accordance with male standards of what is obscene or indecent. As noted by Dworkin, these standards treat women’s bodies as being dirty and needing to be covered so they do not corrupt the morals of the viewer. Such an approach provides women harmed by pornography with no remedy, and in fact makes pornography more appealing by making it forbidden. Australia had the opportunity to address these pornographic harms when it amended the *Broadcasting Services Act* to insert a new Schedule 5 regarding online services. However, it failed to take this opportunity, and instead adopted a method of internet regulation premised upon censorship and morality, in which internet users who encounter

pornography on the internet, are responsible for reporting the content to the Australian Communications and Media Authority (ACMA).

Chapter 4 further critiqued morality based approaches to regulating pornography. It examined Dworkin, MacKinnon and Itzin's analysis of obscenity law as means of regulation, which was seen to be useless to regulate pornography in that it assisted to define pornography and make pornography more appealing by its suppression. This chapter also outlined the Canadian Supreme Court cases of *Butler* and *Little Sisters* in which the court recognised that pornography contributed to maintaining systemic gender discrimination in society. Although the Canadian Supreme Court recognised these harms in its interpretation of the obscenity provisions in the *Canadian Criminal Code*, the court was still constrained by the underlying morality of the legislation. Furthermore, although the Supreme Court was progressive in its interpretation of these obscenity provisions, the decision about what is obscene was still left in the hands of the State – that is, police and customs officials, who would undoubtedly apply their own prejudices to their decisions about what is obscene or indecent. This was illustrated in particular by the *Little Sisters* case where materials destined for gay and lesbian bookstores were disproportionately targeted by Customs officials.

The case of *Horne*, illustrated that a sex equality approach is a useful one in empowering women themselves to take action against pornography, instead of relying on the state to make these decisions for them. Chapter 4 illustrated how the ordinance can work through applying the provisions of the ordinance to the facts of *Horne*. This exercise illustrated that

the women in *Horne* could have been further empowered by the ordinance, for example, by being able to obtain injunctive relief and a greater amount of damages not only against their employer, but the men responsible for forcing the pornography upon them.

This chapter also illustrated that the ordinance could be adapted, with relatively little change, to address internet pornography. Difficulties as to where a woman can bring an action under the ordinance can be addressed with reference to the High Court case of *Gutnick*, regarding internet defamation. *Gutnick* provides that regardless of the country of origin of the publication, the harm results where the internet defamation is viewed. The same principle can be applied to pornographic harm, to allow a woman to sue under the ordinance if the harm results in Australia.

MacKinnon and Dworkin's civil rights approach to regulating pornography must be adopted in Australia because it is the only legal model that addresses the very real harms women suffer as a result of pornography. This can be achieved through amendment to state and federal anti-discrimination laws such as the *Equal Opportunity Act 1984* (WA) and the *Sex Discrimination Act 1984* (Cth). In relation to internet pornography, the *Broadcasting Services Act* should be amended to reflect what it should have done in the first place – to address pornographic harms. This can be achieved through the ordinance, with minor amendment to address internet pornography, being incorporated as an amendment to the Act. Unless and until this is done, women will not be able to achieve true equality and equal participation in society, and women will continue to be powerless to fight rape and sexual abuse inspired by, and occurring in the production of, pornography.

APPENDIX**MACKINNON AND DWORKIN'S MODEL ANTIPORNOGRAPHY CIVIL RIGHTS
ORDINANCE¹****Section 1. STATEMENT OF POLICY**

1. Pornography is a practice of sex discrimination. It exists in [place], threatening the health, safety, peace, welfare and equality of citizens in our community. Existing laws are inadequate to solve these problems in [place].
2. Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women. The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, persecution and denigration; promote injury and degradation such as rape, battery, sexual abuse of children, and prostitution, and inhibit just enforcement of laws against these acts; expose individuals who appear in pornography against their will to contempt, ridicule, hatred, humiliation, and embarrassment and target such women in particular for abuse and physical aggression; demean the reputations and diminish the occupational opportunities of individuals and groups on the basis of sex; contribute significantly to restricting women in particular from full exercise of citizenship and participation in the life of the community; lower the human dignity, worth, and civil status of women and damage mutual respect between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the [Constitutions] and [laws] of [place].

Section 2. DEFINITIONS

1. "Pornography" means the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following:
 - a. women are presented dehumanized as sexual objects, things or commodities; or
 - b. women are presented as sexual objects who enjoy humiliation or pain; or
 - c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or
 - d. women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
 - e. women are presented in postures or positions of sexual submission, servility or display; or

¹ This ordinance is reproduced from Dworkin, Andrea and MacKinnon, Catharine A., *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988), Appendix D

- f. women's body parts – including but not limited to vaginas, breasts, or buttocks – are exhibited such that women are reduced to those parts; or
 - g. women are presented being penetrated by objects or animals; or
 - h. women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
2. The use of men, children, or transsexuals in the place of women in [1] of this definition is also pornography for the purposes of this law.
 3. "Person" shall include child or transsexual.

Section 3: CAUSES OF ACTION

1. *Coercion into pornography.* It is sex discrimination to coerce, intimidate, or fraudulently induce (hereafter, "coerce") any person into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance(s). The maker(s), seller(s), exhibitor(s) and/or distributor(s) of said pornography may be sued for damages and for an injunction, including to eliminate the product(s) of the performance(s) from the public view.

Proof of one or more of the following facts or conditions shall not, without more, preclude a finding of coercion:

- a. that the person is a woman; or
- b. that the person is or has been a prostitute; or
- c. that the person has attained the age of majority; or
- d. that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
- e. that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
- f. that the person has previously posed for sexually explicit pictures with or for anyone, including anyone involved in or related to the making of the pornography; or
- g. that anyone else, including a spouse or other relative, has given permission on the person's behalf; or
- h. that the person actually consented to a use of a performance that is then changed into pornography; or
- i. that the person knew that the purpose of the acts or events in question was to make pornography; or
- j. that the person showed no resistance or appeared to cooperate actively in the photographic sessions or events that produced the pornography; or
- k. that the person signed a contract, or made statements affirming a willingness to cooperate in the production of the pornography; or

- l. that no physical force, threats, or weapons were used in the making of the pornography; or
 - m. that the person was paid or otherwise compensated.
2. *Forcing pornography on a person.* It is sex discrimination to force pornography on a person in any place of employment, education, home, or any public place. Complaints may be brought only against the perpetrator of the force and/or the entity or institution responsible for the force.
 3. *Assault or physical attack due to pornography.* It is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography. Complaints may be brought against the perpetrator of the assault or attack, and/or against the maker(s), distributor(s), seller(s), and/or exhibitor(s) of the specific pornography.
 4. *Defamation through pornography.* It is sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image and/or recognizable personal likeness. For purposes of this section, public figures shall be treated as private persons. Authorization once given can be revoked in writing any time prior to any publication.
 5. *Trafficking in pornography.* It is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs.
 - a. Municipal, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves but excluding special display presentations, shall not be construed as trafficking in pornography.
 - b. Isolated passages or isolated parts shall not be the sole basis for complaints under this section.
 - c. Any woman may bring a complaint hereunder as a woman acting against the subordination of women. Any man, child, or transsexual who alleges injury by pornography in the way women are injured by it may also complain.

Section 4. DEFENCES

1. It shall not be a defense to a complaint under this law that the respondent did not know or intend that the materials at issue were pornography or sex discrimination.
2. No damages or compensation for losses shall be recoverable under Sec 3(5) or other than against the perpetrator of the assault or attack in Sec 3(3) unless the defendant knew or had reason to know that the materials were pornography.
3. In actions under Sec 3(5) or other than against the perpetrator of the assault or attack in Sec 3(3), no damages or compensation for losses shall be recoverable against maker(s) for pornography made, against distributor(s) for pornography distributed,

against seller(s) for pornography sold, or against exhibitor(s) for pornography exhibited, prior to the effective date of this law.

Section 5. ENFORCEMENT

1. *Civil action.* Any person who has a cause of action under this law may complain directly to a court of competent jurisdiction for relief.
2. *Damages*
 - a. Any person who has a cause of action under this law, or their estate, may seek nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorneys' fees and costs of investigation.
 - b. In claims under Sec 3(5), or other than against the perpetrator of the assault or attack under Sec 3(3), no damages or compensation for losses shall be recoverable against maker(s) for pornography made, against distributor(s) for pornography distributed, against seller(s) for pornography sold, or against exhibitor(s) for pornography exhibited, prior to the effective date of this law.
3. *Injunctions.* Any person who violates this law may be enjoined except that:
 - a. In actions under Sec 3(5), and other than against the perpetrator of the assault or the attack under Sec 3(3), no temporary or permanent injunction shall issue prior to a final judicial determination that the challenged activities constitute a violation of this law.
 - b. No temporary or permanent injunction shall extend beyond such pornography that, having been described with reasonable specificity by said order(s), is determined to be validly proscribed under this law.
4. [sic]. *Other remedies.* The availability of relief under this law is not intended to be exclusive and shall not preclude, or be precluded by, the seeking of any other relief, whether civil or criminal.

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